

Briefing Note

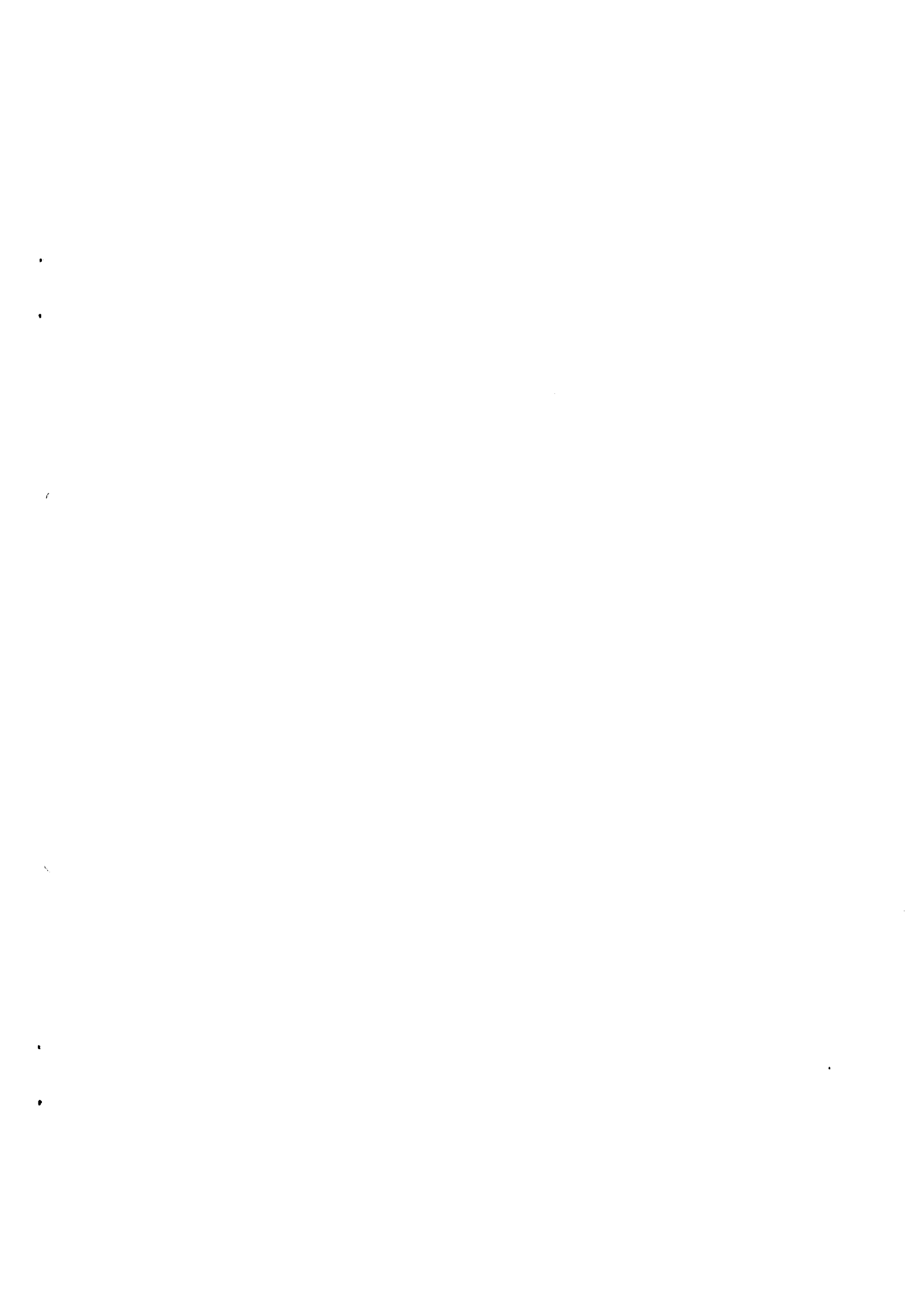


Heritage Conservation in NSW The Legal Position

by

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Introduction

The purpose of this paper is to clarify the legal position concerning heritage in New South Wales and to point out the practical limitations and consequences of various heritage laws and controls.¹ It is divided into 3 main parts:

- A Concept of Heritage**
- B Heritage Law**
- C Issues in Heritage Management**

A Concept of Heritage

The term heritage referred originally to the tangible and intangible things and circumstances children inherited from their parents. Nowadays the concept has a far wider meaning, referring to the inheritance by the contemporary generation of the ideas, mores, system of government, knowledge, buildings and environment of past generations. Tangible heritage is now known by the more general title of environmental heritage and is often the subject of legal and/or governmental consideration and control.

Environmental heritage tends to be divided into two broad categories: natural heritage and built heritage.

Natural heritage comprises the environment including tracts of land and areas of the coast and waterways. Wilderness areas have been included as natural heritage. However, a natural heritage classification does not always necessitate that the land or area involved is substantially untouched by human inhabitation. In more recent times, natural heritage has also come to include Aboriginal heritage, both in terms of sacred sites and places and aboriginal artefacts.

Built heritage includes all buildings, surrounding lands, relics and structures, for example, stone walls, picket fences, gardens that were constructed and nurtured since European settlement in Australia and which are more than fifty years old. Thus, built heritage includes items as disparate as Hyde Park Barracks and the writing desk D.H. Lawrence used whilst residing in Australia and composing his novel *Kangaroo*.

The heritage value of an item, be it natural or built heritage, is decided almost entirely on the basis of the 'significance' of that item on either a national or State wide basis. Guidelines have been formulated with the intention of making the process of heritage identification simpler and more uniform. The fact remains, however, that what may be of significance to one person or section of the population may be an irrelevance to another. The main difficulty therefore with identifying items of heritage value lies in the inherently subjective component of assessing what is of significance to either the entire population of Australia,

¹ The Department of Planning's *Heritage Assessment Guidelines* which include a brief section on the concept of heritage and environmental heritage is appended to this paper. An up-to-date list of heritage items is available from the New South Wales Heritage Council Information Centre.

individual States or Territories or perhaps even smaller regions.

Further, whilst few would debate the worth of preserving some items from our past, or indeed of protecting the pristine state of some areas of our continent, the extent and nature of such protection and preservation remains the subject of debate. Issues arising include the cost and ownership of heritage preservation and conservation, the processes for identifying and preserving heritage, the restrictions on the development of heritage sites and buildings, and the level of government at which such decisions should be made, if at all.

B Heritage Law

Heritage law in New South Wales is the product of international treaties, Commonwealth and State legislation and Local Government regulations. It is necessary therefore that each of these be considered in order to set the picture for practically assessing how heritage works and who controls it at a local level.

1 International Heritage Law

There are a number of international treaties and charters which deal with the concept of heritage and its preservation and which have stimulated domestic interest in the concept. For Australia, the most significant of these is the *Venice Charter 1964*, formulated originally at an International Congress of Architects and Technicians and adopted by the International Council on Monuments and Sites (ICOMOS, 1964). The principles of the *Venice Charter* were adopted and expanded in Australia by the *Burra Charter* of 1978.² The charter, which was ratified in 1988, is seen as the source of change in the focus of heritage from a "European perspective of monuments and sites, to the broader concept of places, which can include archaeological sites, ruins, buildings, engineering structures, groups of buildings and whole urban areas".³

2 Commonwealth Legislation

A number of pieces of legislation at the Commonwealth level deal either specifically or generally with heritage. These include:

Australian Heritage Commission Act 1975 (amended 1991);
World Heritage Properties Conservation Act 1983;
Aboriginal Land Rights (Northern Territory) Act 1976;
Historic Shipwrecks Act 1976;
Aboriginal and Torres Strait Islanders or Heritage Protection Act 1984;

² The full title of this charter is The Australia ICOMOS Charter for the Conservation of Places of Cultural Heritage. It was called the Burra charter because it was developed in Burra, South Australia. A copy of the Charter and its accompanying guidelines are set out in Appendix 1.

³ Lewis M, "Conservation: a regional point of view" in Bourke, M et al (eds) *Protecting the Past for the Future*, AGPS: Canberra, 1983.

*Protection of Movable Cultural Heritage Act 1986; and the National Parks and Wildlife Conservation Act 1975.*⁴

The latter five acts deal predominantly with specific aspects of heritage conservation in Australia and are not dealt with in any detail in this paper.

(a) *Australian Heritage Commission Act 1975*

The *Australian Heritage Commission Act* is by far the most influential piece of Commonwealth legislation directly affecting heritage conservation in Australia.

It was developed out of recommendations arising from a 1972 Report of the Committee of Inquiry into the National Estate⁵. It was seen largely as legislation aimed at identifying and 'registering' a list of items comprising the "national estate", with the underlying idea that any such items would then be preserved. The national estate was defined as:

...those places, being components of the natural environment of Australia or the cultural environment of Australia, that have aesthetic, historic, scientific or social significance or other special value for future generations as well as for the present community.⁶

An item can be listed on the register either by direct nomination by the Australian Heritage Commission, or via the Minister for Planning directing the Heritage Commission to enter a place after a Commission of Inquiry⁷. Public notice of intent to list an item must be given and objections can be made during a period of at least three months. Objectors can also ask the Heritage Commission to furnish them with a statement regarding the significance of the place and, conversely, if it is decided not to list a place, objectors can also ask for a statement of reasons why the place is not of significance in relation to the National Register. At any point the Minister can order that a place not be listed after considering the report of a Commission of Inquiry. The Heritage Commission thus has the power to list a place on its own initiative but must only remove it after giving public notice and considering any objections.

As at August 1993 there were approximately 11 000 items listed Australia wide on the Register. Any member of the public can examine and copy the Register of the

⁴ This Commonwealth Act has specific State and Territory equivalents and therefore is not dealt with in any detail despite its impact on the conservation of Aboriginal and natural heritage.

⁵ The Hope Report. This inquiry was set up at the instigation of then Prime Minister William McMahon who first introduced the concept of "National Estate" in a 1972 Australian Government policy speech. However, most legislation dealing with heritage was not introduced until some time later.

⁶ *Australian Heritage Commission Act 1975*, s 4 (1).

⁷ *Australian Heritage Commission Act 1975*, s 25(2). It should be noted that the direction of the Minister does not have to be in accordance with the recommendations of the Commission of Inquiry; the Minister can direct an Heritage item to be listed even if the Commission does not think it warrants listing. The converse situation also applies.

National Estate.

The Australian Heritage Commission has a number of powers and functions besides simply identifying and registering places of national importance. These functions are set out in section 7 of the Act and include:

- giving advice to the Minister concerning the identification, preservation and improvement of the national estate and expenditure related to these functions plus advising on the financial and other assistance available from the Commonwealth to identify, preserve, improve or present national estate items;
- encouraging public interest and understanding in national estate issues;
- identifying places for inclusion in the national register;
- preparation and updating of the national register;
- furnishing advice and reporting on heritage matters;
- administering the National Estate Grants Program;
- furthering training, education and research in fields relating to the Commission's jurisdiction;
- administration and control of items bequeathed to the national register.

Essentially then, the primary function of the Australian Heritage Commission is maintenance of the National Estate Register and all the associated activities. It should be noted, however, that listing of an item does not ensure its protection, for the Commission itself is not able to protect heritage items. The onus for such protection lies with Commonwealth Ministers, Departments or authorities who must take note of the heritage listing and accordingly engage in no action which will endanger a place listed on the National Register unless there is "no feasible or prudent alternative"⁸ and, if there is no alternative, must ensure that minimal adverse effects result. Unfortunately, the definition of "feasible and prudent alternative" is left open-ended with the result that there is no obligation on the part of the Minister to heed any advice given in relation to a particular heritage place, nor is there any compulsion for the Minister to justify or give reasons for decisions taken.

A problem encountered initially with the Act was deliberate or accidental non-compliance of Departments and Ministers with their responsibilities under section 30 of the Act.⁹ An attempt was made in 1986 to redress this problem through a comprehensive program with a strong practical underpinning in that it focused upon

⁸ *Australian Heritage Commission Act 1975*, s30. It should be noted that there are no specific guidelines or criteria for advising authorities of how a decision concerning the feasibility of alternatives should be made. This matter is one of many under discussion and review in relation to the Act.

⁹ Australian Heritage Commission Annual Reports, 1985-86, p18; 1991-92, p5.

problems with information and resource solutions so that Ministers and Departments could no longer plead that they did not know where to get information and advice concerning their obligations under the Act and for managing heritage items. An increase in requests for advice from various Departments seems to have resulted from this action, but there are still significant problems with the implementation of the Act outside the Heritage Commission.¹⁰

In addition, the exact meaning of the terms "adversely effects" and "significant extent" remain unclear. Cases contesting these matters suggested that the Courts regard conservation of an item as a whole to be the object of the provisions in the Act. Interpretation should therefore err on the side of caution when attempting to gauge whether an action will have an adverse effect and its possible significance. Likewise, there is continued debate on the topic of what constitutes a place of national significance, and indeed, what significance entails. In partial response to these criticisms, the Act was amended in 1991 to insert a section specifying criteria against which places under consideration for the National Registry could be measured:

...a place that is a component of the natural or cultural environment of Australia is to be taken to be a place included in the national estate if it has significance or other special value for future generations as well as for the present community because of any of the following:

- (a) its importance in the course, or pattern of Australia's natural or cultural history;
- (b) its possession of uncommon, rare or endangered aspects of Australia's natural or cultural history;
- (c) its potential to yield information that will contribute to an understanding of Australia's natural or cultural history;
- (d) its importance in demonstrating the principal characteristics of:
 - (i) a class of Australia's natural or cultural places; or
 - (ii) a class of Australia's natural or cultural environments;
- (e) its importance in exhibiting particular aesthetic characteristics valued by a community or cultural group;
- (f) its importance in demonstrating a high degree of creative or technical achievement at a particular period;
- (g) its strong or special association with a particular community or cultural group for social, cultural or spiritual reasons;
- (h) its special association with the life or works of a person, or group of persons, of importance in Australia's natural or cultural history.¹¹

It should be emphasised, however, that these provisions in practice serve only as guidelines and that it is at the discretion of the Government or Minister to decide whether action will affect a place on the National register and whether an item or place should be included at all. The Australian Heritage Commission is only in a position to deliver advice. The ramifications of this situation are that the Minister concerned and the Heritage Commission may end up in conflict. Past experience

¹⁰ Stein, P. et al., *Local Government Planning and Environment NSW*, Sydney: Butterworths, 1993, para [500,125].

¹¹ *Australian Heritage Commission Act 1975*, s 4(1A).

suggests, however, that the Heritage Commission will make no further public comment on such matters once a decision is taken. Further, section 30 of the Act does not bind State and Territory Governments; nor does it apply to private bodies. It may be argued, therefore, that the Act serves predominantly as a means of enabling the Heritage Commission to flag items of heritage value and not as means of enabling such items to be protected.

(b) *The World Heritage Properties Conservation Act 1983*

The *World Heritage Properties Conservation Act 1983* was enacted by the Commonwealth in fulfilment of its obligations under the UNESCO Convention for the Protection of World Cultural and Natural Heritage 1972. Both cultural and natural heritage items are protected under this Act provided that they have either been nominated for inclusion on the World Heritage List, or are subject to an inquiry to determine whether they are worthy of listing, or where the place or item has been declared heritage and listed. The Commonwealth Government does not have to consult with the World Heritage Committee before identifying a property by regulation under the Australian Act. Equally there is no direct provision in the Act for a formal procedure for considering public opinion in relation to a listing. Further, recent court cases have held that there is no compulsion for consideration of economic or social loss in relation to a World Heritage listing.¹²

Identification of an item under the *World Heritage Properties Conservation Act* does not ensure protection. A proclamation by the Governor-General must be made before a place is protected from damage due to development and must be laid before and accepted by both Houses of Parliament.

World Heritage proclamations are also subject to the constitutional division of power between the Commonwealth and the States. Four grounds for Commonwealth intervention in relation to State properties are identified under the Act. These are:

- 1 Section 51 (xx) of the Commonwealth Constitution - the power to make laws with respect to foreign corporations, and trading and financial operations formed within the limits of the Commonwealth.
- 2 Section 51 (xxvi) - the power to make laws with respect to the people of any race for whom it is deemed necessary to make special laws (the Aborigines).
- 3 Section 51 (xxix) - the power to make laws with respect to external affairs.
- 4 The implied power arising from the existence of the Commonwealth as the national government.

These provisions were discussed and upheld by the High Court in the Tasmanian Dam Cases of 1983.¹³

¹² Farrier, D., *The Environmental Law Handbook*, Sydney: Redfern Legal Centre Publishing, 1993, pp 230-235.

¹³ *Commonwealth v Tasmania* (1983) 46 ALR 625. This case is discussed in Farrier, D, 1993 op cit, pp 231 - 235.

3 New South Wales Legislation

Before 1977 there was no specific legislation in force in New South Wales dealing with heritage. Thus, preservation and conservation of heritage items was largely the result of pressure and interest groups lobbying government to protect particular sites and places. This situation changed in the late seventies largely as a result of the Green Ban movement of the Builders' Labourers Federation and their action in relation to Kelly's Bush at Hunter's Hill in Sydney.¹⁴

A number of Acts now govern heritage in New South Wales.¹⁵ The major Acts are:

The Heritage Act 1977;
The Environmental Planning and Assessment Act 1979;
The Local Government Act 1919 (amended 1993);
The Historic Houses Act 1980;
The National Parks and Wildlife Act 1974; and
The Wilderness Act 1987.

The latter two Acts deal mostly with natural heritage. The *National Parks and Wildlife Act* having sole responsibility for Aboriginal heritage, which is specifically excluded from inclusion under the *Heritage Act*. There is some pressure, however, for New South Wales to enact a specific piece of legislation dealing with Aboriginal heritage such as has been enacted in other states.¹⁶ Provision for inclusion of Aboriginal sacred or significant sites under the *Wilderness Act* has also given this Act a de facto role in the preservation of Aboriginal heritage.

The *Historic Houses Act* is a more specific piece of legislation which is concerned with the governing of house museums rather than with identification or preservation of heritage in a general sense. The Act required the establishment of an Historic Houses Trust made up of seven trustees who manage and maintain, as house museums, properties and buildings acquired by the Trust and who also provide educational and informational services in relation to these buildings. The Trust is able to purchase historic houses as well as manage government-owned heritage houses. Currently the Trust owns eleven houses including Hyde Park Barracks, Elizabeth Bay House, Elizabeth Farm and Vacluse House. Funds for the Trust are partly Trust generated and partly from government consolidated revenue.

A feature of heritage protection in New South Wales is the devolution of responsibility to Local Government so that, although there is an *Heritage Act* (1977), much of the day to day activities involving heritage are the business of individual councils and planning authorities. This devolution was formalised by a Ministerial directive (G21) under section 117(2) of the *Environmental Planning and*

¹⁴ Munday, *J Green Bans and Beyond*, Angus and Robertson: Sydney, 1981.

¹⁵ A diagram setting out the major acts and administrators in the New South Wales Heritage System is contained in Appendix 2.

¹⁶ See the *Report of the New South Wales Task Force on Aboriginal Heritage and Culture*, National Parks and Wildlife Service, New South Wales, 1989.

Assessment Act 1979 in 1985. The directive sought to clarify the responsibilities of Local Government stating that although the Heritage Council had specific duties under the Act, "the main responsibility for ensuring conservation rests with local councils" (Stein, P et al., 1993, op cit, para [501,535]). A copy of this directive is appended to the paper. It should be noted, however, that where the *Heritage Act* and the *Environmental Planning and Assessment Act* are in conflict, the *Heritage Act* prevails.¹⁷

(a) ***Heritage Act 1977***

The *Heritage Act* is a much wider and more powerful piece of legislation than the *Australian Heritage Commission Act*. Rather than simply listing items or places of heritage value, it actually contains provisions for the protection and conservation of heritage. In addition, the New South Wales Act also contains a much wider definition of heritage:

"environmental heritage" means those buildings, works, relics or places of historic, scientific, cultural, social, archaeological, architectural, natural or aesthetic significance for the State.¹⁸

Furthermore, "place" is defined as: 'an area of land with or without improvements' and "relic" is defined as:

any deposit, object or material evidence -

(a) which relates to the settlement of the area which comprises New South Wales, not being aboriginal settlement; and

(b) which is 50 or more years old.¹⁹

Thus heritage under the New South Wales Act includes moveable items such as ships, boats and trains and also includes items which are from more recent history.

A twelve member Heritage Council of New South Wales was established under the *Heritage Act*. The Council membership includes the Director-General of the National Parks and Wildlife Service and the Government Architect. The other ten members are appointed by the Minister for Planning under whose jurisdiction the Act falls and include representatives from:

¹⁷ This in part reflects the fact that the *Heritage Act* and the *Environmental Planning and Assessment Act* were originally intended to be one Act with control of all environmental, planning and heritage matters the responsibility of one Minister. Further, it was intended that the *Heritage Act* would be complementary to the *National Parks and Wildlife Act*. Administration of all three Acts was originally the responsibility of the Minister for Lands. However, in 1988 there was a bifurcation of responsibilities for environment and planning such that the Minister for the Environment became responsible for National Parks and Wildlife, and heritage and planning became the responsibility of the Minister for Planning. The Director of the National Parks and Wildlife is, however, by virtue of his/her office, a member of the Heritage Council, thus ensuring some input into the heritage process (Stein, P et al., 1993 op cit, para [500,405]).

¹⁸ *Heritage Act 1977*, s4.

¹⁹ *Heritage Act 1977*, s4.

The Department of Planning
The National Trust
The Royal Australian Historical Society
The NSW Chapter of the Royal Australian Institute of Architects and
the NSW Division of the Royal Australian Planning Institute
The Labour Council of NSW
Local Government
Citizens (reflecting the fact that many heritage items may be
privately owned)
Conservation interest groups
Building, development and properties industries.

The Council gives advice, both to the Minister for Planning and to the public at large, and makes recommendations concerning matters of environmental heritage. The Council's other responsibilities include providing education and information on heritage and the completion of research and investigations concerning heritage. The functions of the Heritage Council have also been widened more recently to include making submissions relating to environmental studies, draft environmental planning instruments and environmental impact statements concerning Local Government activities in relation to heritage. In addition, and perhaps most importantly, the Heritage Council is primarily responsible for the making of conservation orders (interim, permanent or urgent) such as can be issued under the *Heritage Act*. Amendments to the act in 1987, however, gave the Minister and the Council the power to delegate to any person his/her or its functions under the Act. This has resulted in significant increases in the practical implementation of heritage law at the local government level. In addition, the widening of responsibility for all heritage matters to Local Government and the Department of Planning²⁰ has led to a significant reduction in the number of conservation orders issued by the Heritage Council (for example, in 1989, 38 interim conservation orders were made by the Heritage Council, in 1992 only one was made).

(i) *Identification of heritage*

Heritage may be identified by either the Heritage Council, the Department of Planning or by Local Government. If the Heritage Council lists either an item or a place, that item or place may then be the subject of either an interim or permanent conservation order. Such identification and conservation occurs by implementation of the provisions contained in the *Heritage Act*. Local Government identifies heritage by drafting Local Environmental Plans (LEPs) or Heritage Plans which ideally should be preceded by a Heritage Study if it is intended to list heritage items.²¹ This process occurs under the provisions contained in the *Environmental*

²⁰ The G21 directive from the Minister clarifying the responsibilities of Local Government under section 117(2) of the *Environmental and Planning Assessment Act 1979* made it quite clear that Local Government was expected to make provisions concerning heritage whilst making environmental plans and further, that Local Government was in a position to protect and conserve heritage items by invoking conservation orders. A copy of this directive is contained in Appendix 3.

²¹ The advice of the Heritage Council and the opinion dominating the literature, however, is that there is no legal requirement for heritage listing at Local Government level to be preceded by a properly completed Heritage study or indeed by any community or expert consultation.

Planning and Assessment Act. Guidelines for the identification of heritage items are issued by the Heritage Council. However, it should be noted that there is no explicit instruction as to criteria for the identification of heritage items under either the *Heritage Act* or the *Environmental Planning and Assessment Act*. Criteria can be implied from those provisions in the *Heritage Act* stating the objects of the Act, as well as from provisions defining terms such as "environmental heritage".²² Advice from the Heritage Council indicates that LEPs listing heritage items which don't fall within the departmental guidelines, or which, alternatively, omit items or places which do fall within the guidelines, are unlikely to receive Ministerial approval and must therefore either be discarded or re-worked. The Department of Planning may also impose heritage considerations on Local Government through the creation of Regional Environmental Plans (also drawn up under the auspices of the *Environmental Planning and Assessment Act*) with Local Government obliged to at least list those items or places which are subject to interim or permanent conservation orders under the *Heritage Act* and those items which appear on the National Estate Register²³ in their LEPs. Heritage lists composed by the Heritage Council are available for public scrutiny free of charge. Local Governments are obliged to publicly display proposed LEPs to enable public comment and scrutiny.

(iii) *Effects of heritage listing*

Heritage listing by the Heritage Council under the *Heritage Act* is much more protective than parallel listing under the Commonwealth Act. The Heritage Council has the power not only to advise the Minister and other authorities concerning heritage but also has the power to evoke a range of short and long term conservation orders designed to protect heritage. These include:

- Permanent conservation orders (PCO);
- Interim conservation orders (ICO); and
- Two short-term emergency orders under section 130 and section 136 of the *Heritage Act*.

All such orders are, however, subject to Ministerial approval.

As a result of amendments to the Act in 1987, the Heritage Council is also able to

²² Various authors state that the need for explicit criteria for identification of heritage items or places is a pressing need and one which would go a long way towards imposing objectivity, uniformity and consistency on an otherwise remarkably subjective process (eg. Stein, P et al., *Local Government Planning and Environment NSW*, Sydney: Butterworths, 1993).

²³ See the discussion of the *Australian Heritage Commission Act* earlier. The National Estate Register is constructed by the Australian Heritage Commission under the auspices of the *Australian Heritage Commission Act 1975*. This is a Commonwealth Act enabling the Heritage Commission to identify and list items or places of 'national significance' but which does not invest any power in the Commission to ensure the protection and conservation of those items or places listed. Such responsibility falls to the various departments, authorities and Ministers within whose jurisdiction the items or places are located and has resulted in somewhat inconsistent protection and conservation of identified heritage. The greatest power of the Heritage Commission is largely as an advisory body to the Minister concerned and is also supplemented by the moral persuasion of the need to protect and conserve something which has been particularly identified.

make submissions relating to environmental studies, draft environmental planning instruments and environmental impact statements at a Local Government level. Local Government is concomitantly obliged to take note of such submissions and to give appropriate attention and notice to the protection of heritage items so identified. Another result of these same amendments was the power given to the Minister or Heritage Council to delegate in writing to any person his/her or its legislative functions in either a general or limited sense. The practical result of this has been the delegation of the power to issue s130 and s136 orders to Local Government for the protection of heritage from demolition, destruction or despoliation pending preparation of an LEP.

(iii) *Conservation orders*²⁴

The *Heritage Act* actually contains no explicit instructions concerning the criteria for making a conservation order, however, these can be inferred from the objects of the act and from the definitions of terms such as "conservation"²⁵, "environmental heritage" and "precinct"²⁶. Implied criteria can also be deduced from s41 of the Act which details the grounds on which an objection can be lodged against a conservation order (more detail concerning these is supplied in the section dealing with interim conservation orders), although it should be noted that demonstrating grounds for such an objection does not necessarily render an objection sufficient for revoking the order.

(iv) *Interim conservation orders*
(sections 24-34 of the *Heritage Act*)

Interim conservation orders are made in situations where the Heritage Council (and now delegated Local Government authorities) recommend that an item or precinct may warrant protection after investigation. These orders are ultimately decided by the Minister for Planning and do not require notification by the Minister of affected land holders or owners of the intention to post such an order; a provision designed to avoid giving opportunity for the destruction of items before an order takes effect. Interim conservation orders come into effect upon publication in the Government Gazette and are operational for twelve months from that date. Owners and other affected persons, including planning authorities should then be notified as soon as possible after publication in the Gazette. However, lack of notification of the order does not nullify the conservation order. If an owner, mortgagee or lessee of land affected by an order lodges an objection within six months of the order taking effect an inquiry must be held. Objections must be lodged on any of four specified grounds:

²⁴ Appendix 4 contains a diagram setting out the application process for items covered by interim and permanent conservation orders.

²⁵ "Conservation" is defined to include 'preservation, protection, maintenance, restoration and enhancement' under section 4 of the *Heritage Act*.

²⁶ Stein, P et al. (eds), *Local Government Planning and Environment*, Volume C, Sydney: Butterworths, 1993, paragraph [500,780].

- the subject of the order does not legally constitute environmental heritage
- permanent conservation of the item or precinct is not necessary
- reasonable or economic use of the item or precinct will not be possible if it is subject to a conservation order
- financial hardship would result from conservation of the item or precinct.²⁷

Objections to conservation orders must be lodged within these terms, but demonstrating the validity of such an objection is not necessarily sufficient reason to compel the Minister for Planning to revoke a conservation order.

Members of the public can only appear at an inquiry with the permission of the Commissioner of Inquiry. The Minister for Planning then makes a decision upon making the interim conservation order a permanent one or revoking it after receiving the report from the Commissioner of Inquiry. Receipt of the report does not, however, require that the Minister makes a decision consistent with the report's recommendation.

In situations where there is no objection to the interim conservation order, an inquiry does not occur but the Heritage Council must carry out an investigation to determine whether a permanent conservation order or special provision under the *Environmental Planning and Assessment Act* should occur. Such an investigation must occur within twelve months of the conservation order. The Heritage Council will then make a recommendation to the Minister who has final say. Once again there is no compulsion upon the Minister to make a decision consistent with the recommendation of the Heritage Council. It is also the case that the Heritage Council is unlikely to publicly dispute or comment upon a Ministerial decision, a political courtesy that is not embraced by the National Trust.

Interim conservation orders cease to apply when PCOs come into effect for that same piece of heritage or where a heritage precinct comes under the protection of an environmental planning instrument.²⁸

(v) *Permanent conservation orders*
(sections 35A-55 of the *Heritage Act*)

Permanent conservation orders do not have to be preceded by interim conservation orders as the Heritage Council can recommend a permanent conservation order wherever it considers it is necessary. Owners of heritage items can also apply directly to the Minister for a permanent conservation order. In such cases the Minister may ask the Heritage Council for an opinion on any such proposed listing. If the Minister decides to go ahead with a permanent conservation order, public notice must be given in daily newspapers and owners, occupiers and local council must also be notified. Public submission must be invited and anybody (ie. not just owners, mortgagees and lessees) can make a submission on any grounds. An

²⁷ *Heritage Act 1977*, s41.

²⁸ *Heritage Act 1977*, s30(2).

inquiry must be held if owners, mortgagees or lessees object to the proposed order on any of the grounds outlined previously for interim conservation orders. Members of the public may only be heard at such an inquiry with the permission of the Commissioner of Inquiry. However, copies of the report the Commissioner makes to the Minister must be made available to the public. Once again final decisions occur at the Minister's discretion and must be published in the Government Gazette. Owners and occupiers of affected land and the local council must then be notified.

Permanent conservation orders may be revoked by the Minister after considering recommendations from the Heritage Council. If a revocation is considered, the Minister must give notice to the local council and to affected owners and occupiers and public notice must also be given. Any member of the public can make a submission concerning the proposed revocation on any grounds and if any submission constitutes an objection then an Inquiry must be held at which that person has a right to be heard. A report of the Inquiry and a recommendation from the Commissioner must go to the Minister following an Inquiry and must be made available to the public. The Minister, however, makes the final decision. Revocation becomes effective upon publication in the Gazette and the notice must be given to owners, occupiers and local council.

The public therefore have a much greater role in the revocation of conservation orders than in their institution.

(vi) Effects of ICOs and PCOs
(section 57 of the *Heritage Act*)

Both interim and permanent conservation instruments have essentially the same effect with the difference being the duration of protection. ICOs, as mentioned, are only valid for twelve months unless an inquiry is being held or Ministerial decision sought. PCOs are, in contrast, permanent unless revoked.

Both ICOs and PCOs prevent a range of activities from being carried out on heritage items or places unless Heritage Council approval is sought and gained,²⁹ or unless exemptions are possible (eg for the rendering of a building safe for human habitation through the installation of fire safety equipment etc).³⁰ Demolition, defacement, damage and alteration of heritage items and sites as well as development are prohibited. Applications to complete such activities must be made on a particular form seeking Heritage Council approval. The Council makes an initial decision with the provision that if they believe that an application would 'materially affect the significance of' heritage then they must advertise the application in a State wide daily newspaper and invite inspection of the proposal in the ensuing three weeks. Any person may make written submissions concerning the proposal. The Heritage Council will then make a decision on the proposal after looking at the impact in terms of heritage significance and conservation. It should be recognized, however, that the Heritage Council has virtually unlimited scope to take into account any matter which might have a bearing on the proposal when

²⁹ *Heritage Act 1977*, s 57(1).

³⁰ *Heritage Act 1977*, s 57(2).

reaching a decision. Thus the financial impact of rejecting a proposal may be considered, as may other factors impacting upon the owner or developer. The scope of the Heritage Council in this capacity is designed therefore to allow practical implementation of heritage legislation and is not simply a means by which heritage can or will be preserved regardless of the financial, social or environmental cost. The Heritage Council cannot, however, approve demolition of an item or place subject to either an ICO or a PCO and the definition of demolition includes both damage and defacement.

The Heritage Council can issue a conditional approval for work or works to be carried out on an heritage item or place. Such approval may not meet with the owner or developer's pleasure and may result in an appeal lodged with the Minister for Planning. Appeals may also be lodged where outright refusal of development or works applications occur or where a decisions on such applications take too long. The Minister does not have to order an inquiry into the matter but may choose to do so. If an inquiry occurs then the Heritage Council, the applicant and any person who previously made written objections concerning the proposal has a right of appearance. The Commissioner of Inquiry reports back to the Minister who subsequently makes a decision which may involve total rescission of the application despite earlier conditional approval.

One other provision for heritage protection invested in conservation orders is the express prohibition of allowing a building or work subject to a conservation order to fall into disrepair.³¹ This provision is designed to prevent owners or developers from deliberately allowing their property to fall into a state of disrepair in order to facilitate demolition of the property or development on the land or adjoining land (such tactics were a real risk, especially in situations where the Heritage Council had refused approval for all works). Under section 119 of the Act, the Heritage Council can require the carrying out of repairs to a heritage item or place and where these are not completed may order their completion at the owner or developer's expense. Alternatively, the land can be compulsorily purchased or a Ministerial directive preventing development of the land for a period of up to ten years placed. The Heritage Council may also request owners or developers to explain within 21 days why an order to carry out specific repairs should not be made³² and where explanations are not forthcoming or are inadequate order repairs³³. A right of appeal to the Land and Environment Court does exist against such orders.

Conservation instruments therefore provide reasonably robust and permanent protection for heritage items and places especially from complete destruction.

(vii) Emergency conservation orders

Conservation orders made under section 130 and 136 of the *Heritage Act* are designed to provide short-term emergency protection for heritage items which are

³¹ *Heritage Act 1977, s117.*

³² *Heritage Act 1977, s118.*

³³ *Heritage Act 1977, s119.*

under immediate threat from demolition, destruction or despoliation.³⁴ Such orders are made subject to Ministerial approval but can also be instigated by the Heritage Council and/or Local Government. There is no compulsion for the Minister to consult the Heritage Council when making a section 130 order. Section 136 orders can be made by either the Minister or the Chairperson of the Heritage Council.

Section 130 orders may only be made in situations where the Minister is of the opinion that subsequent investigation may provide justification for either an ICO or a PCO. Section 130 orders do not come into effect until published in the Gazette; they are therefore of limited usefulness in emergency conservation situations. Public notice of the order to affected persons must follow Gazette publication.

Unlike conservation instruments, section 130 orders only prevent demolition of buildings or works, which includes defacement or damage but not alteration. These orders may also be used to prevent harm to relics and places including the removal of vegetation. Section 130 orders last for twelve months unless revoked by the Minister or ICOs or PCOs are made. Notice served on the Heritage Council may abbreviate this period to 40 days if the person lodging the notice is the one intending to carry out the work. In addition, the Heritage Council may grant approval for the completion of minor works without lifting or violating the order.

Section 136 orders may be issued without publication in the Gazette and are effective upon affixation to the building, work or place. These orders require a cessation of all activities for 40 days during which time the Heritage Council must decide whether an ICO or PCO is warranted.

(viii) Remedies and Penalties for infringements under the Heritage Act

Both remedies and penalties are available under the *Heritage Act*. Proceedings can be brought about by anyone against an alleged offender in the Land and Environment Court to restrain the breach or to remedy the situation. Remedies may include work to repair damage and penalties in the form of imprisonment; fines may also be imposed on offenders. Members of the public may only bring proceedings under the Act in Local Courts, where penalties are less severe, unless they gain Ministerial approval. A final, and severe, sanction is available to the Minister who may issue an order prohibiting development for up to ten years although the owner must first be allowed an opportunity to demonstrate reasons against this action. Revocation of any such order is at any time at the discretion of the Minister.

In situations where conservation requirements under the *Heritage Act* are in conflict with other development plans or legislation, for example a restrictive covenant, the Minister for Planning may set aside or modify the conflicting requirements provided

³⁴ The reasons for these orders was the occurrence of 'overnight' demolition of buildings which were to be listed as heritage items upon Gazette publication. However, section 130 and 136 orders also include 'relics' and places. Relics may not be removed, damaged, altered or despoiled. Place protection includes prohibition of the removal or destruction of trees and vegetation. Street trees have been the subject of a number of section 136 orders (Stein, P. et al., 1993, op cit, para [501,265]).

the need to conserve the heritage justifies this action.³⁶ Such orders must be published in the Gazette and require prior agreement of any other Minister responsible for the competing requirements. Ministerial power here extends to overturning prohibitions on development if such action is, in his/her opinion the only economically viable means of preserving the heritage item.³⁸

(b) *Environmental Planning and Assessment Act 1979*

(i) *Environmental Planning Instruments*

Planning instruments come in wide and varied forms and are designed to achieve an equally wide variety of planning objectives. One such objective is heritage conservation, an objective that was given full weight as a result of Directive G21 by the Minister for Planning under s117 of the *Environmental Planning and Assessment Act*.³⁷ This directive made it explicit that Local Government had to make provisions for heritage conservation when making environmental planning instruments and that, where possible an heritage study should be carried out to provide a basis for identification and assessment of heritage within an LEP area. Heritage studies are commissioned by local councils who also supervise them. Funding, however, is jointly shared between the local council and the Department of Planning, an arrangement that has largely come about as a means of compensating Local Government for the increased responsibilities and costs associated with the devolution of heritage management from the Heritage Council to Local Government. There is no obligation on Local Government to make a heritage study prior to listing items or places as of heritage 'significance', although advice from the Heritage Council indicates that this lack of legal compulsion is largely offset by the fact that all environmental planning instruments are subject to final Ministerial approval and such approval is unlikely to be forthcoming if heritage items are inappropriately listed or, indeed, omitted. The fact remains, however, that identification of heritage continues to rely upon a reasonable degree of subjective assessment by whoever or whatever body is contemplating listing the item and rigorous assessment procedures are not mandatory before heritage is listed.

The heritage focus of LEPs tends to be on those items or places which are of local rather than State significance.³⁸ Local heritage studies should include:

³⁶ Section 129 of the *Heritage Act* operates to enable this action which has an extremely wide application extending not only to government instruments but also to private agreements between property owners.

³⁸ See *Leichhardt Municipal Council vs Minister for Planning*, 1992, 77 LGRA 64.

³⁷ This directive is contained in an appendix to this paper. The directive provides that, unless special circumstances apply, conservation provisions must be included in draft LEPs covering 'buildings, works, relics, places of heritage significance; or areas of ecological significance' (Farrier, D, *The Environmental Law Handbook*, Sydney: Redfern Legal Centre Publishing, 1993, p225). The definition of, or criteria for determining, 'significance' are not specified.

³⁸ This change in focus has enabled the protection of many heritage items that were previously not considered to warrant heritage listing because of their lack of inherent 'State-wide significance'. The situation remains, however, that 'state-wide significance' can be interpreted in either a broad or narrow sense.

- investigation into the history of the area's development, including identification of themes associated with the area's growth;
- surveys of the area and identification of potential heritage items and their relationship to development themes;
- delineation of priorities and conservation strategies.³⁹

(iii) *Heritage protection under the Environmental Planning and Assessment Act*

Heritage listing by Local Government ostensibly confers parallel and equal protection upon heritage. The G21 directive also made it clear that local heritage issues should be dealt with at a local level, with conservation instruments and environmental planning instruments operating alongside of each other where items are of more than purely local significance. However, in reality, and despite the fact that the Heritage Council has adopted a policy of not issuing conservation orders for heritage items or places listed under LEPs, the protection invested in an LEP is much less certain and permanent than that vested in a conservation order. This is because of two reasons. First, the potentially more dynamic nature of Local Government (when compared to State Government) may see more frequent changes in both Council membership and policy concerning conservation and development. Secondly, the lack of explicit provisions in the *Environmental Planning and Assessment Act* for Local Government to actually preserve and conserve heritage items renders protection somewhat open-ended and subject to wide interpretation in application. Local Government is obliged to take note of and provide consideration for the protection and conservation of heritage items when planning LEPs or approving development; but it is not forbidden from developing, demolishing or despoiling heritage items provided that they can demonstrate that such due notice and consideration has taken place. In addition, 'significance' of a potential heritage item or place occurs in relation to particular council areas rather than the whole State.⁴⁰

Noting of heritage under LEPs, REPs and draft environmental plans requires that consent be obtained for demolition of heritage and for renovations and extensions. Renovations may include external painting; demolition is defined as advertised development. Some LEPs may include provisions requiring Heritage Council notification or even power of veto over proposals; however, this is not mandatory. Equally the recent tendency for some councils to include a requirement for assessment rather than just consideration of development potential to affect heritage is also not obligatory. It is more common, however, for LEPs to include a provision requiring consent for the carrying out of development in the vicinity of heritage items or places. Such provisions may extend to special floor space ratio bonus for buildings on heritage occupied land, with the result that the uses to which a building can be put may be greater than would otherwise be permitted. Likewise, owners or developers of heritage can apply to the Department of Planning

³⁹ Farrier, D, op cit p224.

⁴⁰ Advice from the Heritage Council and opinions documented in the literature (for example, Farrier, 1993, op cit and Stein et al., 1993, op cit) suggest that the opposite tactic had previously been applied by the Heritage Council in its assessment of potential heritage. Thus 'state-wide' significance had been interpreted literally with the result that local attractions or sites were unlikely to gain listing and thus protection. This change in approach has therefore offered protection to many previously ignored or dismissed heritage items or places.

to have a formal assessment of heritage with a view to obtaining reduced rate evaluations.

(c) ***Local Government Act 1919***

To a large extent the powers of Local Government in relation to heritage results from the provisions contained in the *Environmental Planning and Assessment Act* and in particular from the 1985 Ministerial directive concerning s117 of this Act (see previous footnotes concerning this directive and attached) which placed particular responsibilities upon Local Government to incorporate heritage conservation provisions into LEPs. The recent (1993) amendment to the *Local Government Act*, however, expanded these powers and responsibilities so that Local Government has increased power to control the demolition of buildings in its area. Councils must consider the impact of orders relating to heritage and must notify the Heritage Council in relation to items listed on the National Estate unless such items are also listed under an LEP.

4 Intergovernmental Agreement on the Environment

In response to the complexities involved, concerted attempts have been made in recent years to achieve greater coordination and agreement of heritage activity between all levels of government. The 1992 Intergovernmental Agreement on the Environment (IGAE), which was signed by all Federal, State and Territory governments and the Local Government Association of Australia, confirms this development. The IGAE seeks to provide a mechanism by which a cooperative national approach to the environment is facilitated, to ensure better definition of the roles of all levels of government, fewer disputes between the Commonwealth and States and Territories concerning environmental issues and greater certainty concerning government and business decision making and environmental protection results.

The IGAE contains nine schedules dealing with specific environmental issues and areas. Schedule 7 deals with heritage and affirms the role of the Australian Heritage Commission in relation to the National Estate.

C Issues in Heritage Management

There is an ongoing process of review of the system for heritage management in New South Wales⁴¹ and this is reflected in the various amendments to the *Heritage Act*, the *Environmental Planning and Assessment Act* and the enactment of the new *Local Government Act*. Despite these legislative adjustments, there remains a feeling concerning heritage that further rationalization and adjustment is

⁴¹ The Department of Planning and the Heritage Council have produced two papers entitled *Heritage System Review - Discussion Paper* (April 1992) and *Heritage System Review - Technical Paper* (May 1992) which aim to summarise the major issues and ideas for improvement identified in the review of the Heritage System instigated by the Minister for Planning (The Hon. Robert Webster, MLC) in August 1991.

needed.⁴² Whether or not any such changes occur remains to be seen, but for the purposes of information, the main suggestions and issues are outlined in the subsequent paragraphs. There is no intention here to canvass any opinion upon the merit or otherwise of these suggestions, nor is it intended that this section should be taken as a complete coverage of the issues involved.

1 What is heritage?

A number of authors raise this question and point out the lack of specific objective criteria for the identification either of heritage or the definition of 'significance' contained within the *Heritage Act*. Opponents to this view point out that such a flexible approach to heritage identification is essential as criteria can always be narrowly interpreted to exclude items that should be included. Further disagreement arises in regards to the criteria for making conservation instruments. There does not seem to be a simple answer to this issue as it encompasses not only questions of identification but also of jurisdiction. There does seem to be agreement, however, that as heritage is 'an exclusively anthropocentric phenomenon'⁴³, 'the development of a set of consistent, rigorous state (or nation) wide criteria is widely accepted as a necessary "first step towards planning for the effective management and conservation of heritage items"^{44/45}.

2 At what cost should heritage be protected?

The *Heritage Act*, by virtue of the provisions relating to the grounds for objecting to interim conservation orders, makes it clear that it is "not concerned to preserve the environmental heritage at all costs".⁴⁶ Furthermore, there are a number of so called heritage incentives available under the *Heritage Act* and (potentially) through the actions of Local Government. These include direct grants and loans provided under the Heritage Assistance Program, reassessment of land valuation and thus land taxes and rates for all properties or items subject to permanent conservation orders, more flexible use provisions and waiving development application charges. There remains, however, a community perception and, perhaps, a commercial reality, that heritage listing confers adverse economic circumstances upon a property.

A recent study where real estate agents and residents were interviewed concerning their opinions of the potential costs and benefits of heritage listing highlights this

⁴² Stein, P. et al., 1993 op cit.

⁴³ Farrier, D, op cit p219. As mentioned earlier, one of the greatest ongoing problems with heritage assessment and protection is the subjective component of evaluation of worth in a heritage sense. Compounding this is the lack of decision concerning whether 'worth' should be measured in an international, national, state or local sense.

⁴⁴ Heritage Council Annual Report No. 19.

⁴⁵ Stein, P et al., op cit para [500,780].

⁴⁶ Farrier, D, op cit p221.

point.⁴⁷ All of the estate agents stated that heritage identification would have an economic impact upon the sale and value of a residential property. Twenty-five per cent of the agents thought that the effects would be totally negative, largely because of a reduced potential market and development restrictions and the remainder of the agents thought that heritage listing could have either a positive or negative effect. Positive effects were attributed to the 'good condition' of a property and the prestige of heritage listing. Negative effects were attributed to problems associated with development, particularly if the building was in bad condition but the land value was high. Estate agents also mentioned problems associated with valuing heritage properties with final valuations varying by up to \$50 000 and all agents said that they would not buy a heritage property for investment purposes. Ninety-nine per cent of residents also thought that heritage listing would have an effect on the value of residential properties and 24 % thought this effect would be purely negative, 23 % purely positive and 53 % both positive and negative. Once again, reasons for positive evaluations rested largely with prestige associated with owning or occupying a 'piece of history' and negative evaluations were related to restrictions upon alteration and development.

3 Who should manage heritage?

As mentioned, following the legislative developments in relation to heritage reveals devolution of heritage control from the Heritage Council and Department of Planning to Local Government. Whilst the Minister for Planning ultimately has the final say concerning the listing of heritage items, the issuing of conservation orders and approval of environmental planning instruments, Local Government clearly has control and authority for day to day management of heritage. This situation has both detractors and advocates. However, a number of commentators have noted that "additional support and resources need to be provided to assist Local Government"⁴⁸ in the management and conservation of heritage. Such resources should not be purely financial in nature as one of the most common complaints made in relation to Local Government identification of heritage is the lack of heritage identification and assessment expertise and experience present in local councils. Wider use of both the *Heritage Act* and the *Environmental Planning and Assessment Act* has also been canvassed especially in relation to Aboriginal Heritage and natural heritage. There are also suggestions that legislative changes might be appropriate. The most radical of these is the amalgamation of all the State's heritage legislation, including the *National Parks and Wildlife Act*, into one act.⁴⁹ This would make heritage conservation at a State level parallel with Federal heritage conservation. Logical though this might seem to its proponents, such amalgamation seems unlikely at this stage, especially considering the vast administrative changes that it would require and, perhaps more importantly, the review of the *National Parks and Wildlife Act* which is already underway. It should be noted, however, that amalgamation of all legislation dealing with heritage into one Act would serve the purpose of restoring heritage control under the authority

⁴⁷ Longford, K.G., *Local Government Heritage Conservation: an assessment of the process and identification of effects*, 1993.

⁴⁸ Department of Planning and Heritage Council, *Heritage System Review - Discussion Paper*, Sydney, April 1992.

⁴⁹ *Heritage System Review Discussion Paper*, 1992 op cit, p9.

of one department and one Minister as was the case when legislation was first proposed in the late 1970s.

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Appendix 1

**The *Burra Charter* and guidelines to the Burra Charter
from *Heritage Study Guidelines*, Heritage Council of NSW, 1994**

THE AUSTRALIA ICOMOS CHARTER FOR THE CONSERVATION OF PLACES OF CULTURAL SIGNIFICANCE (The Burra Charter)

Preamble

Having regard to the International Charter for the Conservation and Restoration of Monuments and Sites (Venice 1966), and the Resolutions of 5th General Assembly of the International Council on Monuments and Sites (ICOMOS) (Moscow 1978), the following Charter was adopted by Australia ICOMOS on 19th August 1979 at Burra Burra. Revisions were adopted on 23rd February 1981 and on 23 April 1988.

Definitions

Article 1. For the purpose of this Charter:

- 1.1 *Place* means site, area, building or other work, group of buildings or other works together with associated contents and surroundings.
- 1.2 *Cultural significance* means aesthetic, historic, scientific or social value for past, present or future generations.
- 1.3 *Fabric* means all the physical material of the *place*.
- 1.4 *Conservation* means all the processes of looking after a *place* so as to retain its *cultural significance*. It includes *maintenance* and may according to circumstance include *preservation*, *restoration*, *reconstruction* and *adaptation* and will be commonly a combination of more than one of these.
- 1.5 *Maintenance* means the continuous protective care of the *fabric*, contents and setting of a *place*, and is to be distinguished from repair. Repair involves *restoration* or *reconstruction* and it should be treated accordingly.
- 1.6 *Preservation* means maintaining the *fabric* of a *place* in its existing state and retarding deterioration.
- 1.7 *Restoration* means returning the EXISTING *fabric* of a *place* to a known earlier state by removing accretions or by reassembling existing components without the introduction of new material.
- 1.8 *Reconstruction* means returning a *place* as nearly as possible to a known earlier state and is distinguished by the introduction of materials (new or old) into the *fabric*. This is not to be confused with either re-creation or conjectural reconstruction which are outside the scope of this Charter.
- 1.9 *Adaptation* means modifying a *place* to suit proposed compatible uses.
- 1.10 *Compatible use* means a use which involves no change to the culturally significant fabric, changes which are substantially reversible, or changes which require a minimal impact.

Explanatory Notes

These notes do not form part of the Charter and may be added to by Australia ICOMOS.

Article 1.1

Place includes structures, ruins, archaeological sites and landscapes modified by human activity.

Article 1.5

The distinctions referred to in Article 1.5, for example in relation to roof gutters, are:

- maintenance — regular inspection and cleaning of gutters
- repair involving restoration — returning of dislodged gutters to their place
- repair involving reconstruction — replacing decayed gutters.

Conservation Principles

Article 2. The aim of *conservation* is to retain the *cultural significance* of a *place* and must include provision for its security, its *maintenance* and its future.

Article 3. *Conservation* is based on a respect for the existing *fabric* and should involve the least possible physical intervention. It should not distort the evidence provided by the *fabric*.

Article 4. *Conservation* should make use of all the disciplines which can contribute to the study and safeguarding of a *place*. Techniques employed should be traditional but in some circumstances they may be modern ones for which a firm scientific basis exists and which have been supported by a body of experience.

Article 5. *Conservation* of a *place* should take into consideration all aspects of its *cultural significance* without unwarranted emphasis on any one aspect at the expense of others.

Article 6. The conservation policy appropriate to a *place* must first be determined by an understanding of its *cultural significance*.

Article 7. The conservation policy will determine which uses are compatible.

Article 8. *Conservation* requires the maintenance of an appropriate visual setting: e.g., form, scale, colour, texture and materials. No new construction, demolition or modification which would adversely affect the setting should be allowed. Environmental intrusions which adversely affect appreciation or enjoyment of the *place* should be excluded.

Article 9. A building or work should remain in its historical location. The moving of all or part of a building or work is unacceptable unless this is the sole means of ensuring its survival.

Article 10. The removal of contents which form part of the *cultural significance* of the *place* is unacceptable unless it is the sole means of ensuring their security and *preservation*. Such contents must be returned should changed circumstances make this practicable.

Article 2

Conservation should not be undertaken unless adequate resources are available to ensure that the fabric is not left in a vulnerable state and that the cultural significance of the place is not impaired. However, it must be emphasised that the best conservation often involves the least work and can be inexpensive.

Article 3

The traces of additions, alterations and earlier treatments on the fabric of a place are evidence of its history and uses.

Conservation action should tend to assist rather than to impede their interpretation.

Article 6

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 cultural significance is an essential prerequisite to the preparation of a conservation policy.

Article 7

Continuity of the use of a place in a particular way may be significant and therefore desirable.

Article 8

New construction work, including infill and additions, may be acceptable, provided:

- it does not reduce or obscure the cultural significance of the place
- it is in keeping with Article 8.

Article 9

Some structures were designed to be readily removable or already have a history of previous moves, e.g. prefabricated dwellings and poppet-heads. Provided such a structure does not have a strong association with its present site, its removal may be considered.

If any structure is moved, it should be moved to an appropriate setting and given an appropriate use. Such action should not be to the detriment of any place of cultural significance.

Conservation Processes

Preservation

Article 11. *Preservation* is appropriate where the existing state of the *fabric* itself constitutes evidence of specific *cultural significance*, or where insufficient evidence is available to allow other conservation processes to be carried out.

Article 12. *Preservation* is limited to the protection, *maintenance* and, where necessary, the stabilization of the existing *fabric* but without the distortion of its *cultural significance*.

Restoration

Article 13. *Restoration* is appropriate only if there is sufficient evidence of an earlier state of the *fabric* and only if returning the *fabric* to that state reveals the *cultural significance* of the *place*.

Article 14. *Restoration* should reveal anew culturally significant aspects of the *place*. It is based on respect for all the physical, documentary and other evidence and stops at the point where conjecture begins.

Article 15. *Restoration* is limited to the reassembling of displaced components or removal of accretions in accordance with Article 16.

Article 16. The contributions of all periods to the *place* must be respected. If a *place* includes the *fabric* of different periods, revealing the *fabric* of one period at the expense of another can only be justified when what is removed is of slight *cultural significance* and the *fabric* which is to be revealed is of much greater *cultural significance*.

Reconstruction

Article 17. *Reconstruction* is appropriate only where a *place* is incomplete through damage or alteration and where it is necessary for its survival, or where it reveals the *cultural significance* of the *place* as a whole.

Article 18. *Reconstruction* is limited to the completion of a depleted entity and should not constitute the majority of the *fabric* of a *place*.

Article 19. *Reconstruction* is limited to the reproduction of *fabric*, the form of which is known from physical and/or documentary evidence. It should be identifiable on close inspection as being new work.

Adaptation

Article 20. *Adaptation* is acceptable where the *conservation* of the *place* cannot otherwise be achieved, and where the *adaptation* does not substantially detract from its *cultural significance*.

Article 11

Preservation protects fabric without obscuring the evidence of its construction and use.

The process should always be applied:

where the evidence of the fabric is of such significance that it must not be altered. This is an unusual case and likely to be appropriate for archaeological remains of national importance;

where insufficient investigation has been carried out to permit conservation policy decisions to be taken in accord with Articles 23 to 25.

New construction may be carried out in association with preservation when its purpose is the physical protection of the fabric and when it is consistent with Article 8.

Article 12

Stabilization is a process which helps keep fabric intact and in a fixed position. When carried out as a part of preservation work it does not introduce new materials into the fabric. However, when necessary for the survival of the fabric, stabilization may be effected as part of a reconstruction process and new materials introduced. For example, grouting or the insertion of a reinforcing rod in a masonry wall.

Article 13

See explanatory note for Article 2.

Article 21. *Adaptation* must be limited to that which is essential to a use for the *place* determined in accordance with Articles 6 and 7.

Article 22. *Fabric of cultural significance* unavoidably removed in the process of *adaptation* must be kept safely to enable its future reinstatement.

Conservation Practice

Article 23. Work on a *place* must be preceded by professionally prepared studies of the physical, documentary and other evidence, and the existing *fabric* recorded before any intervention in the *place*.

Article 24. Study of a *place* by any intervention in the *fabric* or by archaeological excavation should be undertaken where necessary to provide data essential for decisions on the *conservation* of the *place* and/or to secure evidence about to be lost or made inaccessible through necessary *conservation* or other unavoidable action. Investigation of a *place* for any other reason which requires physical disturbance and which adds substantially to a scientific body of knowledge may be permitted, provided that it is consistent with the conservation policy for the *place*.

Article 25. A written statement of conservation policy must be professionally prepared setting out the *cultural significance* and proposed *conservation* procedure together with justification and supporting evidence, including photographs, drawings and all appropriate samples.

Article 26. The organisation and individuals responsible for policy decisions must be named and specific responsibility taken for each such decision.

Article 27. Appropriate professional direction and supervision must be maintained at all stages of the work and a log kept of new evidence and additional decisions recorded as in Article 25 above.

Article 28. The records required by Articles 23, 25, 26 and 27 should be placed in a permanent archive and made publicly available.

Article 29. The items referred to in Articles 10 and 22 should be professionally catalogued and protected.

Words in italics are defined in Article 1.

Article 25

The procedure will include the conservation processes referred to in Article 1.4 and other matters described in Guidelines to the Burra Charter: Conservation Policy.

GUIDELINES TO THE BURRA CHARTER: CULTURAL SIGNIFICANCE

These guidelines for the establishment of cultural significance were adopted by the Australian national committee of the International Council on Monuments and Sites (Australia ICOMOS) on 14 April 1984 and revised on 23 April 1988. They should be read in conjunction with the Burra Charter.

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1.0 PREFACE

1.1 Intention of guidelines

These guidelines are intended to clarify the nature of professional work done within the terms of the Burra Charter. They recommend a methodical procedure for assessing the cultural significance of a place, for preparing a statement of cultural significance and for making such information publicly available.

1.2 Applicability

The guidelines apply to any place likely to be of cultural significance regardless of its type or size.

1.3 Need to establish cultural significance

The assessment of cultural significance and the preparation of a statement of cultural significance, embodied in a report as defined in section 4.0, are essential prerequisites to making decisions about the future of a place.

1.4 Skills required

In accordance with Article 4 of the Burra Charter, the study of a place should make use of all relevant disciplines. The professional skills required for such

study are not common. It cannot be assumed that any one practitioner will have the full range of skills required to assess cultural significance and prepare a statement. Sometimes in the course of the task it will be necessary to engage additional practitioners with special expertise.

1.5 Issues not considered

The assessment of cultural significance and the preparation of a statement do not involve or take account of such issues as the necessity for conservation action, legal constraints, possible uses, structural stability or costs and returns. These issues will be dealt with in the development of a conservation policy.

2.0 THE CONCEPT OF CULTURAL SIGNIFICANCE

2.1 Introduction

In the Burra Charter cultural significance means "aesthetic, historic, scientific or social value for past, present or future generations".

Cultural significance is a concept which helps in estimating the value of places. The places that are likely to be of significance are those which help an understanding of the past or enrich the present, and which will be of value to future generations.

Although there are a variety of adjectives used in definitions of cultural significance in Australia, the adjectives "aesthetic", "historic", "scientific" and "social", given alphabetically in the Burra Charter, can encompass all other values.

The meaning of these terms in the context of cultural significance is discussed below. It should be noted that they are not mutually exclusive, for example, architectural style has both historic and aesthetic aspects.

2.2 Aesthetic value

Aesthetic value includes aspects of sensory perception for which criteria can and should be stated. Such criteria may include consideration of the form, scale, colour, texture and material of the fabric; the smells and sounds associated with the place and its use.

2.3 Historic value

Historic value encompasses the history of aesthetics, science and society, and therefore to a large extent underlies all of the terms set out in this section.

A place may have historic value because it has influenced, or has been influenced by, an historic figure, event, phase or activity. It may also have historic value as the site of an important event. For any given place the significance will be greater where evidence of the association or event survives in situ, or where the settings are substantially intact, than where it has been changed or evidence does not survive. However, some events or associations may be so important that the place retains significance regardless of subsequent treatment.

2.4 Scientific value

The scientific or research value of a place will depend upon the importance of the data involved, on its rarity, quality or representativeness, and on the degree to which the place may contribute further substantial information.

2.5 Social value

Social value embraces the qualities for which a place has become a focus of spiritual, political, national or other cultural sentiment to a majority or minority group.

2.6 Other approaches

The categorisation into aesthetic, historic, scientific and social values is one approach to understanding the concept of cultural significance. However, more precise categories may be developed as understanding of a particular place increases.

3.0 THE ESTABLISHMENT OF CULTURAL SIGNIFICANCE

3.1 Introduction

In establishing the cultural significance of a place it is necessary to assess all the information relevant to an understanding of the place and its fabric. The task includes a report comprising written material and graphic material. The contents of the report should be arranged to suit the place and the limitations on the task, but it will generally be in two sections: first, the assessment of cultural significance (see 3.2 and 3.3) and second, the statement of cultural significance (see 3.4).

3.2 Collection of information

Information relevant to the assessment of cultural significance should be collected. Such information concerns:

- (a) the developmental sequence of the place and its relationship to the surviving fabric;
- (b) the existence and nature of lost or obliterated fabric;
- (c) the rarity and/or technical interest of all or any part of the place;
- (d) the functions of the place and its parts;
- (e) the relationship of the place and its parts with its setting;
- (f) the cultural influences which have affected the form and fabric of the place;
- (g) the significance of the place to people who use or have used the place, or descendants of such people;
- (h) the historical content of the place with particular reference to the ways in which its fabric has been influenced by historical forces or has itself influenced the course of history;
- (i) the scientific or research potential of the place;
- (j) the relationship of the place to other places, for example in respect of design, technology, use, locality or origin;
- (k) any other factor relevant to an understanding of the place.

3.3 The assessment of cultural significance

The assessment of cultural significance follows the collection of information.

The validity of the judgements will depend upon the care with which the data is collected and the reasoning applied to it.

In assessing cultural significance the practitioner should state conclusions. Unresolved aspects should be identified.

Whatever may be considered the principal significance of a place, all other aspects of significance should be given consideration.

3.3.1 Extent of recording —

In assessing these matters a practitioner should record the place sufficiently to provide a basis for the necessary discussion of the facts. During such recording any obviously urgent problems endangering the place, such as stability and security, should be reported to the client.

3.3.2 Intervention in the fabric —

Intervention in, or removal of, fabric at this stage should be strictly within the terms of the Burra Charter.

3.3.3 Hypotheses —

Hypotheses, however expert or informed, should not be presented as established fact. Feasible or possible hypotheses should be set out, with the evidence for and against them, and the line of reasoning that has been followed. Any attempt which has been made to check a hypothesis should be recorded, so as to avoid repeating fruitless research.

3.4 Statement of cultural significance

The practitioner should prepare a succinct statement of cultural significance, supported by, or cross referenced to, sufficient graphic material to help identify the fabric of cultural significance.

It is essential that the statement be clear and pithy, expressing simply why the place is of value but not restating the physical or documentary evidence.

4.0 THE REPORT

4.1 Content

The report will comprise written and graphic material and will present an assessment of cultural significance and a statement of cultural significance.

In order to avoid unnecessary bulk, only material directly relevant to the process of assessing cultural significance and to making a statement of cultural significance should be included.

See also Guidelines to the Burra Charter: Procedures for Undertaking Studies and Reports.

4.2 Written material

The text should be clearly set out and easy to follow. In addition to the assessment and statement of cultural significance as set out in 3.2, 3.3 and 3.4 it should include:

- (a) name of the client;
- (b) names of all the practitioners engaged in the task;

- (c) authorship of the report;
- (d) date;
- (e) brief or outline of brief;
- (f) constraints on the task, for example, time, money, expertise;
- (g) sources (see 4.4).

4.3 **Graphic material**

Graphic material may include maps, plans, drawings, diagrams, sketches, photographs and tables, and should be reproduced with sufficient quality for the purposes of interpretation.

All components discussed in the report should be identified in the graphic material. Such components should be identified and described in a schedule.

Detailed drawings may not be necessary. A diagram may best assist the purpose of the report.

Graphic material which does not serve a specific purpose should not be included.

4.4 **Sources**

All sources used in the report must be cited with sufficient precision to enable others to locate them.

It is necessary for all sources consulted to be listed, even if not cited.

All major sources or collections not consulted, but believed to have potential usefulness in establishing cultural significance, should be listed.

In respect of source material privately held the name and address of the owner should be given, but only with the owner's consent.

4.5 **Exhibition and adoption**

The report should be exhibited and the statement of cultural significance adopted in accordance with Guidelines to the Burra Charter: Procedures for Undertaking Studies and Reports.

GUIDELINES TO THE BURRA CHARTER: CONSERVATION POLICY

These guidelines, which cover the development of conservation policy and strategy for implementation of that policy, were adopted by the Australian national committee of the International Council on Monuments and Sites (Australia ICOMOS) on 25 May 1985 and revised on 23 April 1988. They should be read in conjunction with the Burra Charter.

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- 1.2 Cultural significance
- 1.3 Need to develop conservation policy
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- 5.0 The Report
- 5.1 Introduction
- 5.2 Written material
- 5.3 Graphic material
- 5.4 Sources

1.0 PREFACE

1.1 Intention of guidelines

These guidelines are intended to clarify the nature of professional work done within the terms of the Burra Charter. They recommend a methodical procedure for development of the conservation policy for a place, for the statement of conservation policy and for the strategy for the implementation of that policy.

1.2 Cultural significance

The establishment of cultural significance and the preparation of a statement of cultural significance are essential prerequisites to the development of a conservation policy (refer to Guidelines to the Burra Charter: Cultural Significance).

1.3 Need to develop conservation policy

The development of a conservation policy, embodied in a report as defined in Section 5.0, is an essential prerequisite to making decisions about the future of the place.

1.4 Skills required

In accordance with the Burra Charter, the study of a place should make use of all relevant disciplines. The professional skills required for such study are not common. It cannot be assumed that any one practitioner will have the full range of skills required to develop a conservation policy and prepare the appropriate report. In the course of the task it may be necessary to consult with other practitioners and organisations.

2.0 THE SCOPE OF THE CONSERVATION POLICY

2.1 Introduction

The purpose of the conservation policy is to state how the conservation of the place may best be achieved both in the long and short term. It will be specific to that place.

The conservation policy will include the issues listed below.

2.2 Fabric and setting

The conservation policy should identify the most appropriate way of caring for the fabric and setting of the place arising out of the statement of significance and other constraints. A specific combination of conservation actions should be identified. This may or may not involve changes to the fabric.

2.3 Use

The conservation policy should identify a use or combination of uses, or constraints on use, that are compatible with the retention of the cultural significance of the place and that are feasible.

2.4 Interpretation

The conservation policy should identify appropriate ways of making the significance of the place understood consistent with the retention of that significance. This may be a combination of the treatment of the fabric, the use of the place and the use of introduced interpretative material.

In some instances the cultural significance and other constraints may preclude the introduction of such uses and material.

2.5 Management

The conservation policy should identify a management structure through which the conservation policy is capable of being implemented. It should also identify:

- (a) those to be responsible for subsequent conservation and management decisions and for the day-to-day management of the place;
- (b) the mechanism by which these decisions are to be made and recorded;
- (c) the means of providing security and regular maintenance for the place.

- 2.6 **Control of physical intervention in the fabric**
The conservation policy should include provisions for the control of physical intervention. It may:
- specify unavoidable intervention;
 - identify the likely impact of any intervention on the cultural significance;
 - specify the degree and nature of intervention acceptable for non-conservation purposes;
 - specify explicit research proposals;
 - specify how research proposals will be assessed;
 - provide for the conservation of significant fabric and contents removed from the place;
 - provide for the analysis of material;
 - provide for the dissemination of the resultant information;
 - specify the treatment of the site when the intervention is complete.
- 2.7 **Constraints on investigation**
The conservation policy should identify social, religious, legal or other cultural constraints which might limit the accessibility or investigation of the place.
- 2.8 **Future developments**
The conservation policy should set guidelines for future developments resulting from changing needs.
- 2.9 **Adoption and review**
The conservation policy should contain provision for adoption and review.
- 3.0 DEVELOPMENT OF CONSERVATION POLICY**
- 3.1 **Introduction**
In developing a conservation policy for the place it is necessary to assess all the information relevant to the future care of the place and its fabric. Central to this task is the statement of cultural significance. The task includes a report as set out in Section 5.0. The contents of the report should be arranged to suit the place and the limitations of the task, but it will generally be in three sections:
- the development of a conservation policy (see 3.2 and 3.3);
 - the statement of conservation policy (see 3.4 and 3.5);
 - the development of an appropriate strategy for implementation of the conservation policy (see 4.0).
- 3.2 **Collection of information**
In order to develop the conservation policy sufficient information relevant to the following should be collected:
- 3.2.1 **Significant fabric —**
Establish or confirm the nature, extent, and degree of intactness of the significant fabric including contents (see Guidelines to Burra Charter: Cultural Significance).
- 3.2.2 **Client, owner and user requirements and resources —**
Investigate needs, aspirations, current proposals, available finances, etc., in respect of the place.
- 3.2.3 **Other requirements and concerns —**
Investigate other requirements and concerns likely to affect the future of the place and its setting including:
- federal, state and local government acts, ordinances and planning controls;
 - community needs and expectations;
 - locational and social context.
- 3.2.4 **Condition of fabric —**
Survey the fabric sufficiently to establish how its physical state will affect options for the treatment of the fabric.
- 3.2.5 **Uses —**
Collect information about uses, sufficient to determine whether or not such uses are compatible with the significance of the place and feasible.
- 3.2.6 **Comparative information —**
Collect comparative information about the conservation of similar places (if appropriate).
- 3.2.7 **Unavailable information —**
Identify information which has been sought and is unavailable and which may be critical to the determination of the conservation policy or to its implementation.
- 3.3 **Assessment of information**
The information gathered above should now be assessed in relation to the constraints arising from the statement of cultural significance for the purpose of developing a conservation policy. In the course of the assessment it may be necessary to collect further information.
- 3.4 **Statement of conservation policy**
The practitioner should prepare a statement of conservation policy that addresses each of the issues listed in 2.0, viz.:
- fabric and setting;
 - use;
 - interpretation;
 - management;
 - control of intervention in the fabric;
 - constraints on investigation;
 - future developments;
 - adoption and review.
- The statement of conservation policy should be cross-referenced to sufficient documentary and graphic material to explain the issues considered.
- 3.5 **Consequences of conservation policy**
The practitioner should set out the way in which the implementation of the conservation policy will or will not:
- change the place including its setting;
 - affect its significance;
 - affect the locality and its amenity;
 - affect the client, owner and user;
 - affect others involved.

4.0 IMPLEMENTATION OF CONSERVATION POLICY

Following the preparation of the conservation policy a strategy for its implementation should be prepared in consultation with the client. The strategy may include information about:

- (a) the financial resources to be used;
- (b) the technical and other staff to be used;
- (c) the sequence of events;
- (d) the timing of events;
- (e) the management structure.

The strategy should allow the implementation of the conservation policy under changing circumstances.

5.0 THE REPORT

5.1 Introduction

The report is the vehicle through which the conservation policy is expressed, and upon which conservation action is based.

See also Guidelines to the Burra Charter: Procedures for Undertaking Studies and Reports.

5.2 Written material

Written material will include:

- (a) the statement of cultural significance;
- (b) the development of conservation policy;
- (c) the statement of conservation policy;
- (d) the strategy for implementation of conservation policy.

It should also include:

- (a) name of the client;

- (b) names of all the practitioners engaged in the task, the work they undertook, and any separate reports they prepared;
- (c) authorship of the report;
- (d) date;
- (e) brief or outline of brief;
- (f) constraints on the task, for example, time, money, expertise;
- (g) sources (see 5.4).

5.3 Graphic material

Graphic material may include maps, plans, drawings, diagrams, sketches, photographs and tables, clearly reproduced.

Material which does not serve a specific purpose should not be included.

5.4 Sources

All sources used in the report must be cited with sufficient precision to enable others to locate them.

All sources of information, both documentary and oral, consulted during the task should be listed, whether or not they proved fruitful.

In respect of source material privately held, the name and address of the owner should be given, but only with the owner's consent.

5.5 Exhibition and adoption

The report should be exhibited and the statement of conservation policy adopted in accordance with Guidelines to the Burra Charter: Procedures for Undertaking Studies and Reports.

GUIDELINES TO THE BURRA CHARTER: PROCEDURES FOR UNDERTAKING STUDIES AND REPORTS

These guidelines for the preparation of professional studies and reports were adopted by the Australian national committee of the International Council on Monuments and Sites (Australia ICOMOS) on 23 April 1988. They should be read in conjunction with the Burra Charter.

Contents

- 1.0 Preface
- 2.0 Agreements between client and practitioner
- 3.0 Responsibility for content of report
- 4.0 Draft report
- 5.0 Urgent action
- 6.0 Additional work
- 7.0 Recommendations for further investigations
- 8.0 Exhibition and comment
- 9.0 Adoption and review of report
- 10.0 Further evidence
- 11.0 Accessibility of information

1.0 Preface

These guidelines make recommendations about professional practice in the preparation of the studies and reports within the terms of the Burra Charter.

Attention is also drawn to the advice about ethical, procedural and legal matters provided in the practice notes issued by various professional bodies.

2.0 Agreements between client and practitioner

Before undertaking a study or report, the client and the practitioner should agree upon:

- (a) the extent of the task, for example, up to the preparation of a statement of significance, up to the preparation of a statement of conservation policy or up to the preparation of a strategy for implementation;
- (b) the boundaries of the place;
- (c) any aspect which requires intensive investigation;
- (d) the dates for the commencement of the task, submission of the draft report and submission of the final report;
- (e) the fee and the basis upon which fees and disbursements will be paid;
- (f) the use of any joint consultant, sub-consultant or other practitioner with special expertise;
- (g) the basis for any further investigation which may be required, for example, within the terms of 7.0 below or section 3.3 of Guidelines to the Burra Charter: Conservation Policy;
- (h) the representative of the client to whom the practitioner will be responsible in the course of the task;
- (i) the sources, material or services to be supplied by the client including previous studies or reports;
- (j) any requirements for the format or reproduction of the report;
- (k) the number of copies of the report to be supplied at each stage;
- (l) copyright and confidentiality;
- (m) how the authorship will be cited;

- (n) the condition under which the report may be published or distributed by the client, the practitioner or others;
- (o) the procedure for any required exhibition of the report;
- (p) the basis for comment upon the report and any consequent amendment;
- (q) the responsibility for effecting archival storage in accordance with Article 28 of the Burra Charter.

3.0 Responsibility for content of report

The content of the report is the responsibility of the practitioner. The report may not be amended without the agreement of the practitioner.

4.0 Draft report

It is useful for the report to be presented to the client in draft form to ensure that it is understood and so that the practitioner may receive the client's comments.

5.0 Urgent action

If the practitioner believes that urgent action may be necessary to avert a threat to the fabric involving, for example, stability or security, the practitioner should immediately advise the client to seek specialist advice.

6.0 Additional work

Where it becomes clear that some aspect of the task will require more investigation or more expertise than has been allowed within the budget or the terms of the agreement, the practitioner should advise the client immediately.

7.0 Recommendations for further investigations

In respect of major unresolved aspects of cultural significance, conservation policy or of strategies for implementation of conservation policy, recommendations for further investigation should be made only where:

- (a) the client has been informed of the need for such investigation at the appropriate stage and it has been impossible to have it undertaken within the budget and time constraints of the task;
- (b) further information is anticipated as a result of intervention in the fabric which would not be proper at this stage, but which will become appropriate in the future.

Such recommendations should indicate what aspects of cultural significance, conservation policy or implementation might be assisted by such study.

8.0 Exhibition and comment

The report for any project of public interest should be exhibited in order that interested bodies and the public may comment and reasonable time should be allowed for the receipt and consideration of comment. Where public exhibition is not appropriate, comment should be sought from relevant individuals, organisations and specialists.

9.0 Adoption and review of report

Recommendations should be made for the formal adoption of the report and for any subsequent review.

10.0 Further evidence

If after the completion of the report further evidence is revealed, for example, by intervention in the fabric or information from other sources, it is desirable for this evidence to be referred to the original practitioner so that the report may be amended if necessary.

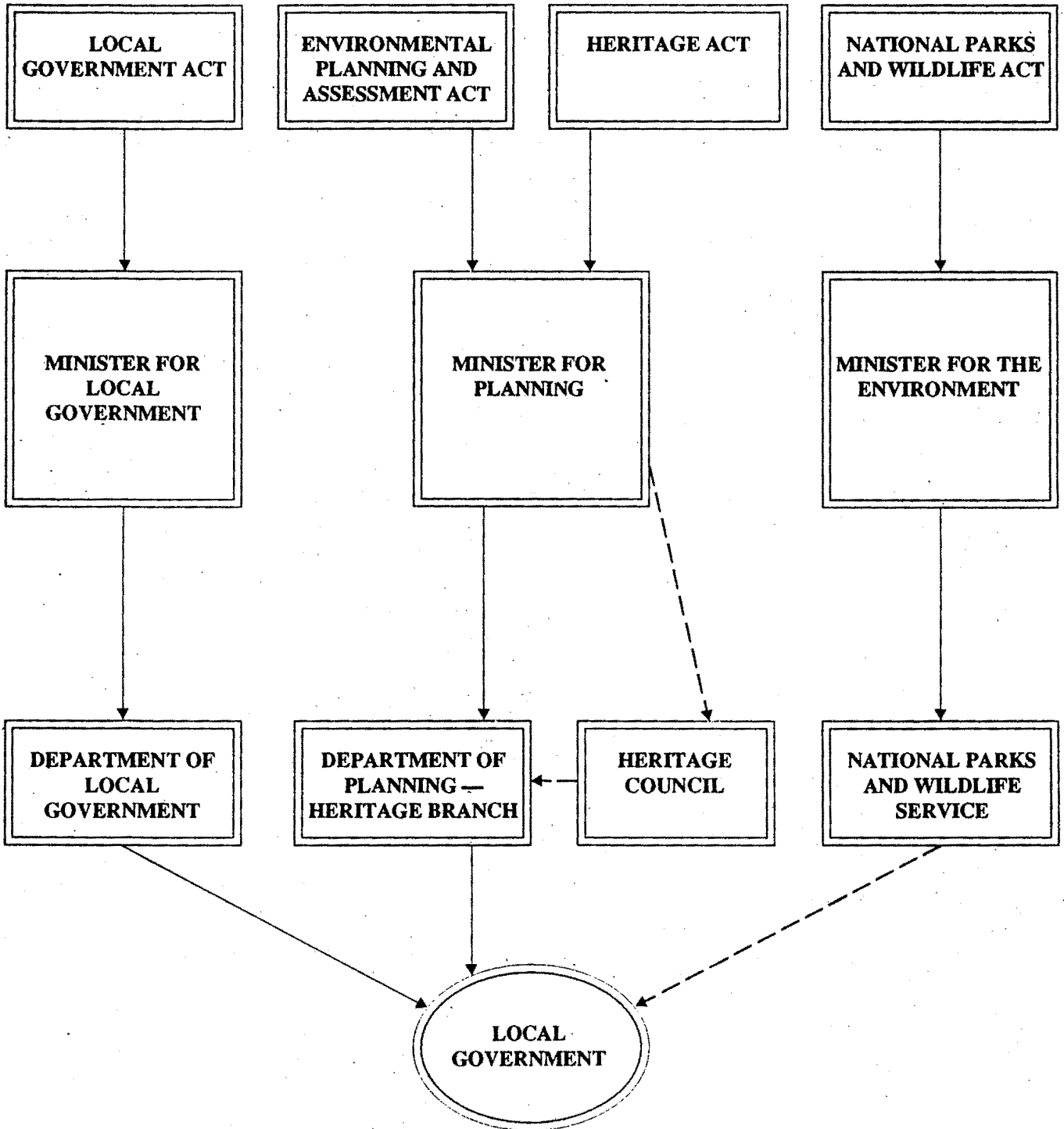
11.0 Accessibility of information

All material relating to the cultural significance of the place should be made readily available to increase the common pool of knowledge. Publication by the client and/or practitioner should be encouraged.

Appendix 2

**Legislation and Administration in the NSW Heritage System
from *Heritage System Review - Discussion Paper*,
Heritage Council of NSW, 1992**

MAJOR ACTS AND ADMINISTRATORS IN THE NSW HERITAGE SYSTEM



Appendix 3

**Section 117(2) G21 Directive and Circular
issued under the *Environmental Planning Assessment Act 1979***

[110,105] G21 Conservation of environmental heritage and ecologically significant items and areas

(1) Except where the council can satisfy the director that any particular provision should be varied or excluded having regard to the provisions of s 5 of the Environmental Planning and Assessment Act 1979, the council shall ensure that, subject to cl (2) of this Direction, where a draft local environmental plan applies to:

- (a) land on which a building, work or relic is situated or which comprises a place, being a building, work, relic or place of historic, scientific, cultural, social, archaeological, architectural, natural or aesthetic significance for the local government area; or
- (b) an area which is of ecological significance for the local government area, the plan shall contain provisions to facilitate the conservation of that building, work, relic, place or area.

(2) Where, before the date of this direction, and in accordance with s 54(4) of the Act, the Secretary was informed of council's decision to prepare a draft local environmental plan, this direction shall not apply in respect of that draft local environmental plan.

[G21 - 16 August 1985 - Circular 84]



Department of Environment and Planning



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Contact: Ms. Burke

Our reference: 80/10297(z)8

Your reference:

CIRCULAR NO. 84

16 August 1985

Direction under Section 117(2) of the Environmental Planning
and Assessment Act, 1979

G. 21. Conservation of Environmental Heritage and Ecologically
Significant Items and Areas

Since the proclamation of the Heritage Act in 1977, and the Environmental Planning and Assessment Act in 1979, there has been some confusion as to whether local councils should incorporate heritage conservation provisions into local environmental plans, or rely upon the conservation orders and mechanisms of the Heritage Act to protect the State's environmental heritage. The Minister has therefore decided to make a Direction pursuant to section 117(2) of the Environmental Planning and Assessment Act (Annexure A) to clarify the position and strengthen the protection of New South Wales' environmental heritage through local plan making processes.

2. Whilst government authorities such as the National Parks and Wildlife Service and the Heritage Council of N.S.W. have specific conservation responsibilities conferred by their Acts, the main responsibility for ensuring conservation rests with local councils.

Application

3. The new section 117 Direction applies to all local government areas in the State and must be recognised in the preparation of local environmental plans. Local plans which are consistent with the Direction through the inclusion of appropriate heritage provisions will be able to be processed quickly. Where a draft plan is inconsistent Council must justify the inconsistency.

Exceptions

4. Where, before the date of this Direction, the Secretary of the Department has been informed pursuant to Section 54(4) of the Act of the Council's decision to prepare a draft LEP, the Direction shall not apply in respect of that draft LEP.

Definitions

5. (a) Environmental heritage means those buildings, works, relics or places of historic, cultural, social, archaeological, architectural, natural or aesthetic significance for the local government area.

In the case of a 'building', this may include anything from a slab hut to a Georgian mansion, a convict stockade site, or a 1930's cinema.

In the case of a 'relic', it can mean anything from the archaeological remains of an old pottery kiln to 19th century tin mine machinery.

A 'work' could mean an early iron suspension bridge or earth work water races for a gold mine.

A 'place' could be a natural area, a cemetery or a garden associated with an historic house.

However, the individual elements of the environmental heritage are best seen in an overall relationship, so that the conservation of representative evidence of all kinds and types of heritage items can be achieved. The philosophy behind this ecological approach is outlined in the Heritage Council's Discussion Paper "Environmental Conservation - Toward a Philosophy" by G. Young, copies of which are available from the Department.

(b) An area having ecological significance would normally constitute all or part of a life support system such as a freshwater system, a wetlands system, the coastal zone, soil systems, forest, scrub and grassland systems or agroecosystems.

The significant area may include, for example, specific habitat for native flora and fauna. However, the intent of Clause (b) of the Direction is to draw to Councils' attention the need to take into account fundamental ecological processes that are not normally contained within specific areas and are independent of many administrative boundaries. For example, the clearing of forests may cause soil erosion, lowering future productivity and causing sedimentation (and possibly flooding) in downstream locations.

The Department's "Rural Land Evaluation Manual" sets out the procedures for investigating physical environmental factors. Chapter 4 describes the zoning of land for environmental protection. A National Conservation Strategy for Australia - Living Resource Conservation for Sustainable Development has been widely endorsed as a basis for integrating conservation and development practices and its principles should therefore be considered for implementation by local councils.

Practice

6. Heritage conservation and environmental protection is an issue requiring assessment at the beginning of the plan making process. Successful conservation requires close co-operation between planning, building and health departments within Council. Of course, conservation may not always be a significant issue, or in the final analysis its importance may be outweighed by other planning issues.

(a) Identification

(i) Heritage Studies

7. The best method of identifying the environmental heritage of any local government area is to undertake a comprehensive heritage study of the area. Over forty such studies are presently underway throughout the State, jointly financed by the Heritage Council of N.S.W. through the Heritage Conservation Fund or the National Estate Grants Program and local councils, on a \$ for \$ basis. Preference is given to Councils preparing comprehensive local government area studies or plans, into which the information from the Heritage Study can be incorporated.

8. Heritage studies follow a standard brief and methodology to ensure their consistency and act as a basis for comparison throughout the State. The studies identify and assess items and areas of heritage significance, based on thorough historical and environmental research and recommend schedules of items for conservation with appropriate provisions. (Refer Flow Chart and Brief, Annexure B).

(ii) Using existing Heritage Registers

9. However, where a heritage study has not been undertaken, information from the Registers of recognised heritage authorities such as the Australian Heritage Commission; the Heritage Council of N.S.W.; the National Trust of Australia (NSW); the Royal Australian Institute of Architects (NSW) Twentieth Century Building Register; and the Geological Society of Australia (NSW) will provide a useful, if minimal schedule of items. Local historical or amenity societies may also be able to provide information from local sources about environmental heritage. Unfortunately these registers are often not comprehensive and will usually provide only the starting point for compiling a heritage schedule for use in an L.E.P.

(b) Analysis

10. Underpinning any schedule of heritage items and areas is a knowledge of the historical background for each item, not just an assessment of its architectural or aesthetic appeal. Each item should then be assessed to establish appropriate conservation action, e.g. demolition control, conservation incentive, assistance etc. The Department will shortly be publishing a Heritage Bulletin on the subject of Heritage Significance Assessment which will assist councils by providing assessment criteria for use by Council in assessing such information.

11. Once a schedule of items and areas has been compiled, existing planning controls and policies must be analysed as well as development pressures, to identify any conservation problems or conflicts affecting identified heritage items. New policies may then be devised to balance conservation and development needs. For example with landuse and zonings - Council should ensure that the uses to be permitted and development standards proposed are compatible with the conservation of the heritage significance and character of the area or item.

(c) Statutory Implementation

12. The draft plan should include relevant conservation aims and objectives, and appropriate clauses from the standard heritage conservation provisions (copy at Annexure C to this circular). It is not necessary for Council to include all the clauses in all plans, but rather to choose and adapt them to suit its own situation. As usual, any detailed guidelines and development standards should be included in a development control plan.

13. As a general rule, it is considered that any plan affecting identified heritage items should contain heritage definitions, aims, provisions regarding notices, advertising and control of development in the vicinity of heritage items. Heads of consideration must be specified on which to determine any development application for:

- (i) new development - so that its scale, form, design materials and landscaping is compatible with and enhances the existing character of an area or item and does not destroy, detract from or overwhelm it (especially needed in conservation areas or when considering development in proximity to an item listed in the heritage schedule of the plan).
- (ii) renovations and additions to buildings - so that the aesthetic or architectural quality of existing items and areas are not diminished.
- (iii) demolition - so that buildings or sites (especially archaeological sites) of particular heritage significance which may not necessarily be architecturally or aesthetically attractive but of historical importance are not unwittingly destroyed.

14. Environmental Protection Zones and Tree Preservation Orders are also appropriate methods of environmental conservation, and can tie in with other controls e.g. for fire hazard areas (Refer Departments' Circular to Councils No. 74). Council's attention is also drawn to the Departments' Circular to Councils No. 35 in regard to tree preservation orders. Such orders may be applied to mapped areas of ecological significance (e.g. wetlands, remnant natural bushland) rather than only to individual trees or lists of tree species. Such complementary measures may be particularly important to protect areas identified for environmental protection zoning in draft LEPs.

15. Items the subject of interim conservation orders, permanent conservation orders or section 130 orders made under the Heritage Act, 1977 should be included in the schedules of the local environmental plan or development control plan. It must be noted that pursuant to Sections 66-69 of the Heritage Act, the Heritage Council must determine applications affecting items covered by ICOs & PCOs before they are determined in the usual way by the local council pursuant to the Environmental Planning and Assessment Act, and any other relevant legislation.

Costs of Heritage Assessments

16. The proposed amendment of the Environmental Planning and Assessment Act to insert section 57(5) envisages that Councils should be able to recover the costs of environmental study required for the preparation of a local environmental plan. Council may also occasionally wish to require applicants to include heritage impact assessments for proposals affecting individual heritage items as part of the development application process, pursuant to Section 32(1) of the Regulations of the Act.

Sources of Heritage Advice

17. The Department's publication Planning for Conservation provides guidelines to assist decision making at development application stage. In addition, professional advice may be gained from

1. Heritage Authorities - such as the National Trust of Australia (NSW) and the Heritage Council of New South Wales (serviced by the Heritage and Conservation Branch of the Department), and the Australian Heritage Commission.
2. Professional heritage consultants - employed on a part-time basis to advise councils on these matters (often jointly funded by the Heritage Council with local councils).
3. Employing a conservation officer within the Council.

4. Environmental Heritage professionally qualified who meet regularly council on current development applicat

Advisory Committee - comprising or experienced representatives a voluntary basis to advise conservation planning issues and

Conclusions

18. It is important to note enabling clauses and do not im restored. Council retains full application process. The a provisions in plans is to ensur to heritage items, not that ensues.

heritage clauses are purely that an item must be kept or retention over the development of introducing the heritage planned consideration is given particular conservation result

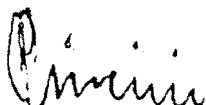
19. In accordance with Depart Direction and Circular has Government and Shires Assoc amendments incorporated at the

tal practice, this Section 117 discussed with the Local ons of N.S.W. and various quest.

Further Information

20. For further advice regarding Council should contact Ms She Conservation Branch of the D regarding the conservation o Council should contact Mr. N Studies Branch of the Departmen

vironmental heritage matters, Burke of the Heritage and ment. For further advice biologically sensitive areas, Irwin of the Environmental



R.L. Pincini
Secretary

attached: A. Section 117 Direc
B. Heritage Study Bri
C. Standard Heritage
(Revised, July 1985).

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Assessment Heritage Bulletin

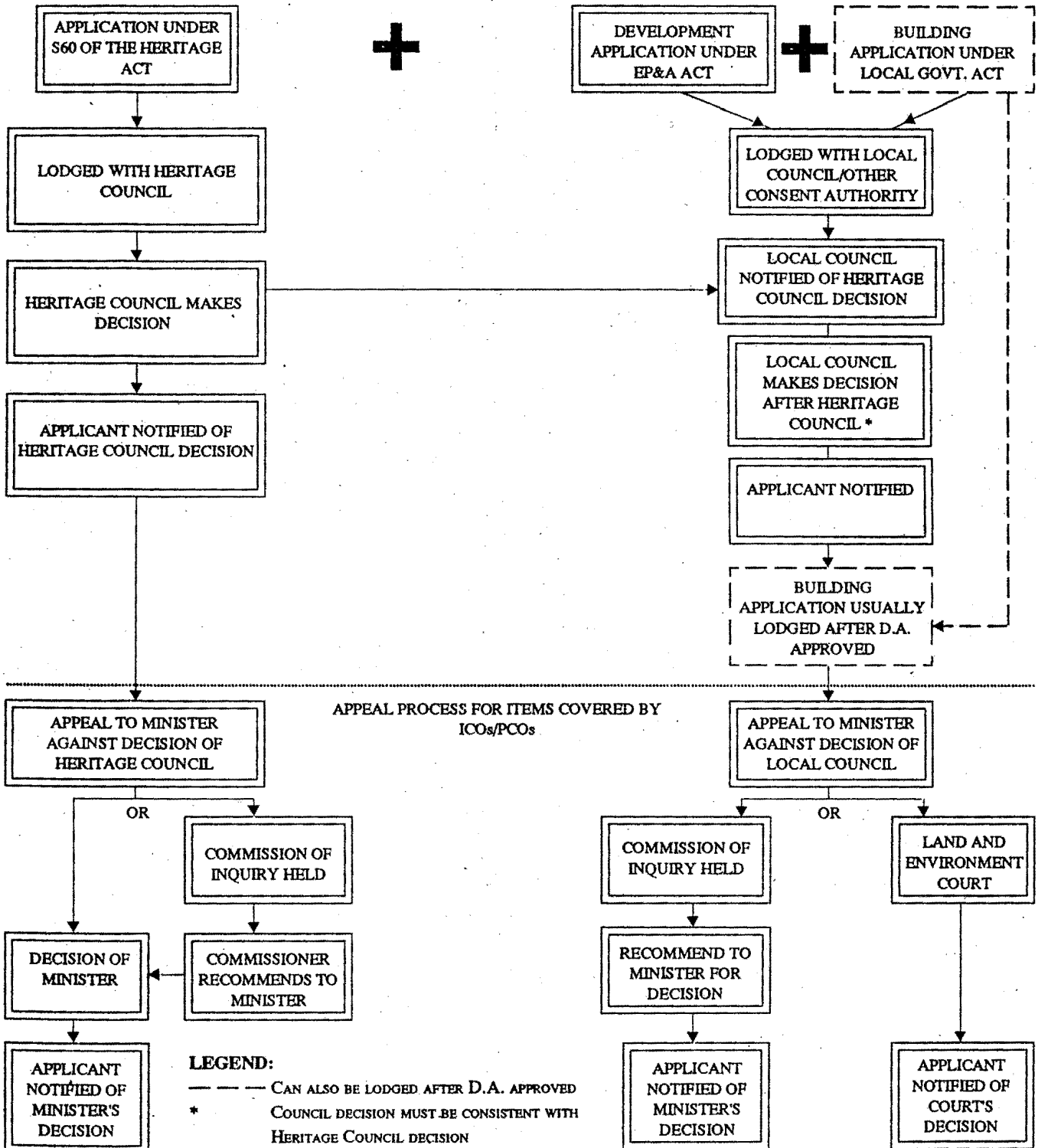
available Environmental Conser
on request: G. Young, Heritage C

on: Toward a Philosophy
il of N.S.W.

Appendix 4

**Development Application Process
for Items covered by ICOs and PCOs
under *NSW Heritage Act 1977*
from *Heritage System Review - Discussion Paper*,
Heritage Council of NSW, 1992**

DEVELOPMENT APPLICATION PROCESS FOR ITEMS COVERED BY ICOs & PCOs



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USER SURVEY *Briefing Note 006/94*

Heritage Conservation in NSW:

The Legal Position

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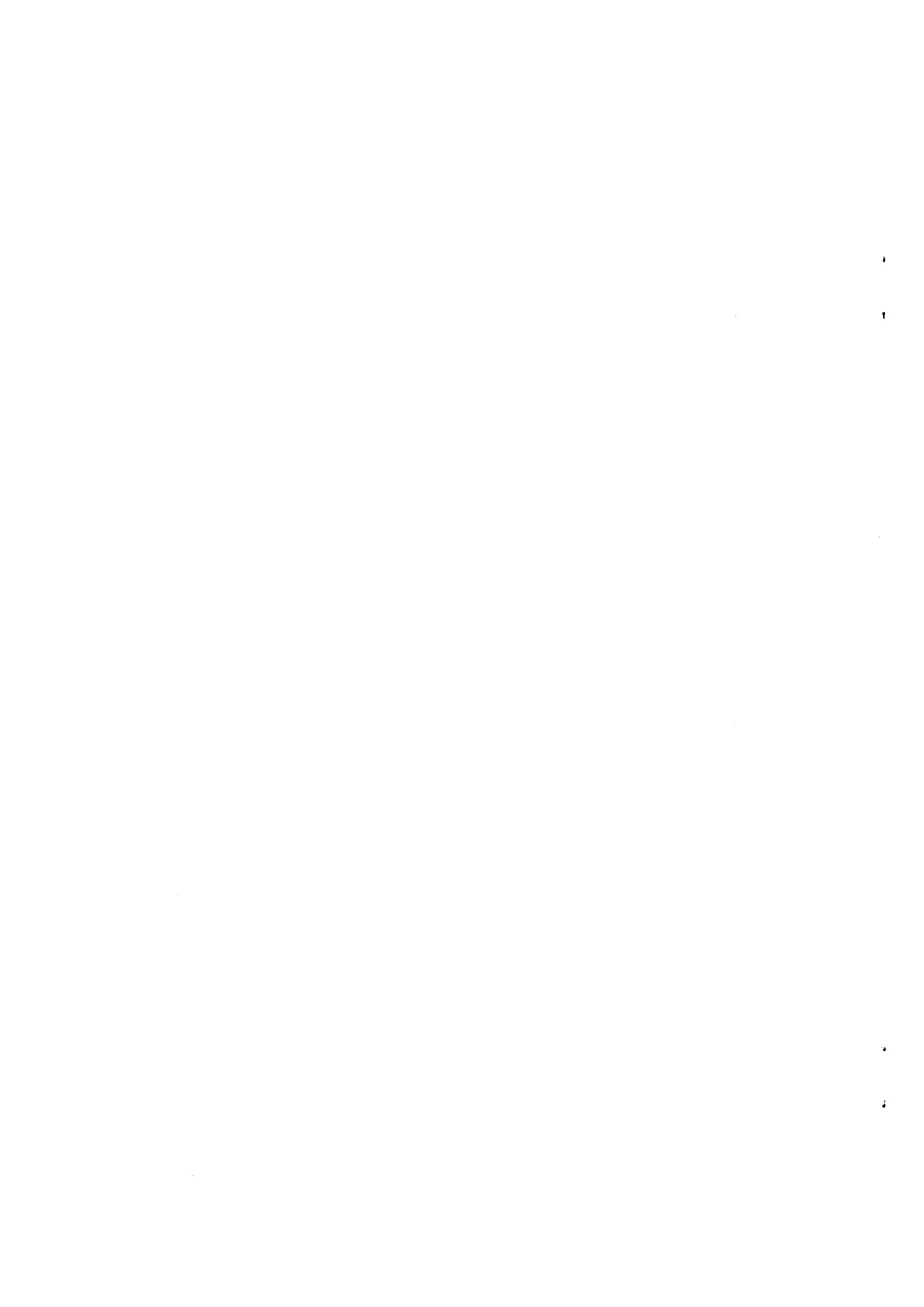
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