Submission 2

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The Research Director
Transport, Housing and Local Government Committee
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Dear Sir/Madam

Queensland Heritage and Other Legislation Amendment Bill 2014

This submission concerns the provisions of the Bill relating to local government heritage registers under planning schemes, and the processes for local heritage listing.

The mechanisms used by local governments for heritage conservation have never been properly integrated with mainstream State heritage conservation processes, but rather operates through the planning system. While places that are listed for heritage conservation by the Commonwealth, State or Local Governments should trigger particular considerations for planning and development purposes, primary heritage conservation ought to be achieved by the same processes regardless of the level of government which causes the listing.

Using the Brisbane City Plan 2000 by way of example, the inclusion of a place on the register contained within the Heritage Register Planning Scheme Policy attracts the operation of the Heritage Place Code under City Plan, the practical consequence of which is to restrict opportunities otherwise available for further development of a listed place. The inclusion of a place on the register also usually alters the level of assessment for development applications in respect of the place, and also in respect of land adjoining the place, from code to impact assessment. This triggers third party submissions and appeal rights.

The criteria for entry in the register are listed in section 2.1 of the Heritage Register Planning Scheme Policy. They mirror those for entry in the Heritage Register maintained under the *Queensland Heritage Act 1992* but limited to matters of significance to the cultural heritage of the City, or the relevant local area. The Act presently says nothing about criteria for local heritage listing. There is no local heritage equivalent of Section 35 of the Act. The approach taken by the Brisbane City Council should be mandated in the new legislation.

The process by which heritage listing happens in Brisbane involves giving an opportunity to the owner of affected land to make submissions with respect to the proposed scheme amendment. This is in accordance with Sections 117 and 118 of the current Act. Those submissions are usually accompanied by reports by

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qualified independent experts in the areas of history and heritage architecture. The Brisbane City Council has a committee which considers those submissions made up of council officers, councillors and consultants. The committee is not wholly comprised of experts and is not independent. The committee reports to the Council on proposed scheme amendments.

I was involved a few years ago in a case in which a building, according to the owner's experts, did not sufficiently retain its original fabric to be capable of demonstrating the evolution or pattern of the City's or local area's history. Both the historian and the heritage architect concluded that the property had been so extensively altered that there was too little of the original fabric surviving to satisfy the relevant criterion. Similarly they concluded that so little of its original fabric remained as to render it incapable of demonstrating rare, uncommon or endangered aspects of the City's or local area's cultural heritage. A second historian was engaged who described the building as "essentially a modern building which contains some small fragments of a historic building which stood on the same site in the past". His detailed survey of the process of "transformation" of the building throughout its history caused him to reject all bases upon which the Council relied for the listing. Nevertheless, the Council, acting on the committee's advice, proceeded under the City Plan 2000 to list the subject property and it remains so listed. There was no detailed analysis in response to the reports of the landowner's experts. Only a decision not to accept them. From that decision the landowner had no right of appeal to any Court, unlike the position which obtains in relation to a similar listing by the Queensland Heritage Council, where a right of appeal to the Planning and Environment Court exists. This is wrong. Affected land owners should be able to have such decisions reviewed by the Planning and Environment Court.

Because Local Heritage Registers have practical operation through their incorporation in planning schemes, enforcement happens in respect of commission, or potential commission, of development offences under the *Sustainable Planning Act 2009* (SPA), rather than directly through the Queensland Heritage Act 1992. It would be preferable for the enforcement regime to have a common approach regardless of which level of government is involved.

Queensland presently has a bifurcated heritage conservation system which adopts different standards and processes across the board. This is not an efficient or effective approach from the perspective of either heritage conservation or protection of individual rights.

It may be suggested by some that there is adequate protection of individual rights in respect of local heritage listings through the operation of the development application (superseded planning scheme) provisions (DA (SPS)) under the SPA. Because the heritage listing involves a change to a planning scheme, a DA (SPS) may be applied for after the scheme change takes effect and this may, depending on the circumstances, trigger a right to claim compensation from the local government should the local government decide to assess the application under the changed scheme and then ultimately refuse it. However, as anyone who has had anything to do with compensation for injurious affection knows, claiming compensation is fraught with difficulty for applicants who are, in effect, forced to apply to redevelop their properties even if they don't wish to do so at that particular point in time. Some, for commercial reasons, are precluded from acting upon a development approval even if they obtained one, while others simply do not have the funds to undertake a major redevelopment. The argument that the presumed right to claim compensation satisfies the obvious natural justice problems with the current local heritage system is flawed. How can such a right, which involves making a development application with all the difficulty and expense that entails, so as to gain a right to develop, be compared to a direct right to challenge an unjustified listing? This is, respectfully, a counter-intuitive way to deal with the rights or wrongs of a proposed listing. The issue should be dealt with at its source rather than indirectly.

At the planning scheme level there should be clear distinction, as opposed to blurring of the boundaries, between planning policies aimed at character retention and heritage conservation. For example, Brisbane City Plan 2000 provides for demolition control precincts that are intended to preserve the character of some of Brisbane's older suburbs based upon the age of dwellings, even

though the dwellings are not of any local heritage significance. That is a legitimate planning approach, as are planning scheme provisions which are designed to protect streetscapes. Heritage conservation is a different matter altogether because it is based around the satisfaction of particular architectural and historical criteria through rigorous evaluation according to the Burra Charter. The two should not be confused. Once a listing happens however it is a legitimate consideration under planning schemes with respect to development affecting the listed place.

Further it is not appropriate for heritage listing through a scheme change to be challenged in the context of an appeal against the refusal of a development application under the changed planning scheme. The Planning and Environment Court in planning appeals has a limited function. It is not undertaking an enquiry into the correctness or otherwise of aspects of the planning scheme and usually it would not do so. The Court's role is a narrow one in appeals and it adopts a self-limiting approach. So a finding to the effect that a place should not have been listed would be unusual. In a case involving the listing by the Brisbane City Council of the property known as "Gwandoben" at 42 Maxwell Street, New Farm the applicant applied for demolition of the building on the basis that there was a complete lack of cultural heritage significance. Essentially it argued that the scheme amendment listing the property was wrong. It was contended by submitters who opposed the demolition, which the council had refused, that it was not appropriate for the Court to permit the appellant to use the proceeding as a de facto merits review of the Council's much earlier decision to enter the building on the register. However, it was pointed out on behalf of the proponent that the City Plan 2000 acknowledges that the register is fallible. In that regard the Heritage Place Code provides, in part as follows:

> *"Citations need not be prepared prior to inclusion of sites in the Heritage Register. However, Council will prepare a Heritage Report when an application is lodged over a site listed in the Heritage Register, to assist in assessment of the proposal against the Heritage Place Code. This report may demonstrate that the site is not worthy of retention on the Heritage Register. Council will then initiate the process of amending the Planning Scheme Policy to remove the site from the register. The preparation of such a report does not override the need for the Heritage Place Code to be addressed as part of a development proposal."*

This clearly demonstrates that local heritage listings may be quite unjustified and can only be undone by a subsequent development application. This approach is not in accordance with the Burra Charter, or the Cultural Heritage Branch publication "Using the Criteria", which do not advocate listing in the absence of evidence that the place has heritage significance in accordance with the accepted criteria.

As the Judge hearing the case pointed out the provision does not expressly contemplate approval of an application to entirely demolish a place on the register, rather it:

> *"1. Contemplates that if Council's Heritage Report demonstrates that the site is not worthy of retention, the Council will initiate an amendment of the register; and*
>
> *2. provides that the preparation of a Report does not override the need for the Heritage Place Code to be addressed.*
>
> *The provision does however, bear out the appellant's point about the fallibility of the register[i]."*

The Court went on to say:

> *"(16) In short, whilst the entry of the place in Schedule 1 of the Policy triggers the requirement for an application for (in this case) demolition, it does not provide conclusive evidence that the place does not have cultural heritage significance, or that the content of*

any significance is in accordance with the citation (if any) prepared by the Council in support of the listing."

The Court went on to find, on the basis of the evidence from the expert witnesses, that the place did have local heritage significance and accordingly the application for demolition was refused.

The point of interest in this case is a development application and an appeal against refusal of that application had to be used in order to challenge the listing and, but for the fallibility of the register point arising from the words in the Code set out above, there would have been no ability to challenge the correctness of the register. Further, even if the result of the case had been the other way around and the development application had been approved, there is no legal requirement for the Council to remove the property from the Register by way of a scheme amendment. Probably the worst feature of the Brisbane City Council's approach is the apparent inclination to list without sufficient evidence, thereby changing the law (through a scheme amendment) with no legal means to subsequently compel reversal of the listing even if an appeal against refusal of a development application succeeds.

All of this serves to demonstrate that the current processes are unworkable and that the listing and delisting mechanisms with respect to matters of State Heritage significance should be mirrored with respect to places that are said to have local heritage significance. Most importantly, both mechanisms should give rise to a direct right of appeal in the Planning and Environment Court against a decision to list or delist a place.

I **enclose** a copy of a paper I have written on this subject which I understand will shortly be published in the Queensland Environmental Practice Reporter.

Yours faithfully

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Reforming the Queensland Heritage Act 1992

Local Heritage Registers – should decisions to list be appealable?
David Nicholls BA. LLM, Partner, HopgoodGanim

As recently pointed out by His Honour Judge Rackermann in a paper published in this journal[1], the Queensland Heritage Act 1982 (**QHA**) does not confer a right to appeal to the Planning & Environment Court (**Court**), from a decision by a local government to enter a place on a local heritage register.[2] This may be compared with a decision to enter a place on the State heritage register for which there is a right of appeal to the Court.[3]

As His Honour Judge Rackermann also points out, entry on a local heritage register is taken to be a change to the local government's planning scheme, which may give rise to a right to compensation for injurious affection under the *Sustainable Planning Act 2009* (**SPA**).[4]

To the extent a local government, such as the Brisbane City Council, is exempt from Part 11 of the QHA because it is prescribed for that purpose, inclusion of a place on the heritage register constitutes a change to a planning scheme triggering a potential right to claim compensation for injurious affection under the SPA in the ordinary way. Where the local government is not so exempt, it is required to have a local heritage register and may of its own volition enter places on it.[5] If a local government does so it is then taken to have changed its planning scheme and the owner of the place entered in the register is entitled to claim compensation under Section 704 of the SPA. The right is the same as that which applies to any planning scheme change. Section 124(4)(c) of the QHA provides that:

> *"The Planning Act Chapter 9 Part 3, applies in relation to the claim with any necessary changes".*

This means that before an entitlement to claim compensation arises, the provisions of the SPA in relation to the making of a development application (superseded planning scheme) (**DA(SPS)**), have to be satisfied.[6] Further the matters which exclude or limit claims for compensation under the SPA are potentially applicable.[7]

One of the limitations on compensation for injurious affection due to a planning scheme change arises where the change –

> *"has the same effect as another statutory instrument, other than a temporary local planning instrument, in relation to which compensation is not payable".*[8]

The State Planning Policy (**SPP**) of July 2014 is a statutory instrument. It expresses the following State interest in relation to cultural heritage –

> *"The cultural heritage significance of heritage places and heritage areas, including places of indigenous cultural heritage, is conserved for the benefit of the community and future generations."*
>
> *"For non-indigenous cultural heritage*

[1] Heritage and Character Buildings: State and Local Controls in Queensland, and the Story of Hesketh House (2014/2015) 20(86) QPER1
[2] Note 1 at 35
[3] QHA section 161
[4] Note 3
[5] QHA section 113 and 116
[6] SPA section 704(1)(b)
[7] SPA section 706(1)
[8] SPA section 706(1)(a)

"... identify heritage places of local cultural heritage significance and heritage areas; and

Facilitating the conservation and adaptive re-use of heritage places of local cultural heritage significance in heritage areas so that the cultural heritage significance of the place or area is retained; and

Including requirements that development on or in heritage places of local cultural heritage significance or heritage areas:

(a) avoids, or otherwise minimises, adverse impacts on the cultural heritage significance of the place; and

(b) does not compromise the cultural heritage significance of the place or area."[9]

Local governments are required to consider and apply the SPP when making or amending planning schemes. While local governments are afforded flexibility in balancing and applying all State interests the State's expectation is clear, and is reinforced by the proposed reforms to the QHA referred to below. Where there is an inconsistency between a SPP and a local planning instrument, the SPP prevails to the extent of the inconsistency.[10]

To the extent that State planning instruments, such as the SPP, impact on the value of land there is no entitlement to claim compensation. Section 706(1)(a) of the SPA is intended to give local governments immunity from claims for compensation in circumstances where a statutory instrument, such as the SPP, imposes a requirement on local government to take particular actions when preparing planning schemes.

The State has proposed amending or replacing the QHA and possibly including a provision that recognises heritage places identified in local planning schemes –

"The Queensland Government proposes to recognise that local governments are now required to identify local heritage places in their planning schemes, and is considering whether to change the Heritage Act to specify the places identified in local planning schemes, in accordance with the single state planning policy, are taken to be local heritage places under the terms of the Heritage Act."[11]

The form in which this policy may ultimately be expressed is unknown but the intent is to put statutory weight behind local heritage registers separately from the SPA's general provisions concerning the making of planning schemes. The effect of this could well be to exclude recourse to the DA (SPS) and compensation provisions of the SPA.

The current bifurcated system for protecting places of cultural heritage significance at the State and local levels is confusing. The secondary bifurcation in relation to local heritage by which some local governments have been prescribed and are exempt from the provisions of the QHA whilst others are not, adds to the confusion.

As pointed out by His Honour Judge Rackermann, there is a distinction between the protections provided to places through State heritage listing, and the concomitant rights of the owners of places so listed, in contrast to heritage protection through planning schemes. The distinction between planning controls on the one hand and heritage listing on the other is demonstrated by comparing the character preservation and local heritage provisions of Brisbane's planning scheme. Whether heritage listing happens at State or local levels, the applicable principles for determining whether to list a place for heritage conservation reasons ought to be identical. Those principles are derived from the Burra

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[9] State Planning Policy July 2014, page 29

[10] SPA section 25

[11] Our Heritage: A collaborative effort Discussion Paper – Review of the *Queensland Heritage Act 1992*, May 2014

Charter.[12] Currently, the clear distinction between the two approaches is that listing at the State level is an administrative action which must objectively satisfy the legislation's listing criteria, and any decision to list may be reviewed on its merits in the court. At the local level, a decision to list is essentially political/legislative and there is no means of having it independently and objectively tested in the court.

Testing the validity of local heritage listing by making a development application after the listing has taken effect is both counter-intuitive and problematic. His Honour Judge Rackermann notes in his paper that:

> *"... the court has accepted that, where evidence establishes that a place has no cultural heritage significance, its entry on the Register would not be an insurmountable hurdle to approval of an application for demolition. In such circumstances the conflict with the planning scheme provisions would be textual, rather than substantive, and there would be a sufficient basis to grant approval notwithstanding the conflict."*

His Honour's judgment in *Cowan v Brisbane City Council* (2012) QPEC 81 is referenced in the paper in support of that proposition. The relevant passages in the judgment were obiter dicta as the evidence in the case did not establish that the place in question had no heritage value. His Honour's comments in *Cowan* have as their source particular provisions of City Plan 2000 which suggest that whether a place satisfies the criteria for local listing may not have been fully considered at the time of listing and may be reviewed when a development application is received. Those provisions have been carried forward in substantially the same form into City Plan 2014, the Heritage Planning Scheme Policy (**HPSP**) in the new scheme relevantly providing:

> *"(3) A citation may have not been prepared prior to including the premises in the Heritage overlay. The Council will prepare a heritage citation when a development application is lodged on the site of a local heritage place to assist in assessing the proposal against the Heritage overlay code. This may demonstrate that the site is not worthy of retention as a local heritage place. The Council may then initiate the process of removing the site from the Heritage overlay."*[13] (My emphasis)

A citation may or may not have been prepared prior to the planning scheme being changed. If a citation has been prepared, there is no reason to think that the listing is open to reversal when a development application is subsequently assessed, or that the court would be prepared to *"review"* the listing. Moreover, it cannot be assumed that all planning schemes will adopt a similar approach to that taken by the Brisbane City Council under City Plan 2000 and City Plan 2014.

This approach is not in accordance with the Burra Charter, nor the Queensland Government's cultural heritage branch publication *"Using the Criteria"*, neither of which advocate listing in the absence of evidence that a place has heritage significance in accordance with the accepted criteria.

Further, it must be observed that even if the preparation by the Brisbane City Council of a heritage citation when responding to a development application suggests to the Council that the place should not have been listed, the Council is under no legal obligation to remove the place from the local heritage register. Section 2(3) of the HPSP is expressed in permissive language.

In the absence of planning scheme provisions which *"open the door"* to challenging the validity of a local heritage listing in an appeal concerning a development application, it is likely to be impermissible for the court to *"disagree"* with such a listing. There is a substantial body of authoritative judicial opinion on this subject in the context of scheme provisions generally. The current Planning & Environment Court, and its predecessor the Local Government Court, as well as the Supreme Court have consistently endorsed a legal principle that in planning appeals the court is not the planning

[12] The Australian ICOMOS Charter 1999 (Burra Charter)

[13] Heritage Planning Scheme Policy, Section 2(3), Brisbane City Plan 2014

authority and cannot make planning policy.[14] Usually it is only possible to argue that a provision of planning scheme is out of date if it can be clearly demonstrated that it has subsequently been overtaken by events and is no longer appropriate.[15] Where a local government has made appropriate investigations and prepared a citation is it open to the court to, in effect, reverse the citation based upon expert evidence in an appeal about a development application? In circumstances where a local government has investigated the local cultural heritage significance of a place, perhaps obtained independent expert advice, and decided to change the planning scheme, the court could well take the view that it has no jurisdiction to interfere, and must apply the scheme as changed. Indeed, it seems inevitable that such a point would be taken against a person seeking to undertake development on or demolition of such a place in the event of an appeal against refusal of the application.

This demonstrates that the current bifurcated system for heritage listing at the State and local levels is flawed. The potential right to compensation for such listing at the local level is likely, not putting too fine a point on it, to be illusory in practice. Successful claims for compensation for injurious affection under SPA and predecessor legislation are rare. Gaining compensation requires the making of a DA (SPS) which involves observing strict, and relatively short, time limits if the rights are not to be lost. The owner of such a place may have no present intention to develop it. There may be commercial arrangements in place, such as a long term lease, which render the making of such a development application impossible or pointless. The economic implications of making such an application may also preclude it. The right to claim compensation, such as it is, is no answer to obvious natural justice shortcomings inherent in the current local heritage listing system. How could such a right, which involves making a development application with the associated difficulty and expense, and then possibly appealing to the court against refusal or conditioning of a development approval, with all of the risks that entails, be compared favourably to a direct right to appeal to the court against a flawed listing?

Conclusion

At the local level, the line of demarcation between development control based upon planning considerations such as character and streetscape and heritage conservation is blurred. Further the legal protections afforded to the owners of places that are subject to State heritage listing are far superior to those of owners of places that are listed under planning schemes. This is a completely unacceptable state of affairs from the perspective of fairness and equity. The owners of locally listed places are denied natural justice. If it is proposed to develop new heritage legislation which strengthens local heritage listing, the legislation should:

- include local heritage listing criteria that mirror at the local scale, the criteria for State listing;
- provide equivalent provisions for removal of places from local heritage registers; and
- provide equivalent rights of appeal to the court.

A common approach at both State and local levels is essential in ensuring that heritage conservation is approached in a consistent and disciplined way, in particular because the initiative for heritage listing at both levels is substantially driven by anonymous submissions from members of the public. The process of local heritage listing needs to be transparent and accountable and this can only be achieved if affected land owners have a direct right of appeal to the court, in which the proposed listing can be objectively assessed having regard to independent expert evidence.

[14] *Grosser v Council of the City of Gold Coast* [2001] QCA 423; *Holts Hill Quarries Pty Ltd v Gold Coast City Council* [2000] QCA 268; *Elan Capital Corporation Pty Ltd v Brisbane City Council* (1990) QPLR 209; *Sheezel & Anor v Noosa Shire Council* (1980) QPLR 30 *Cowan*
[15] See for example, *Handley v Brisbane City Council* [2004] QPEC 39 at [13]