

Aboriginal Cultural Heritage and Victoria's Planning System – lessons for planners

Bryn Davies, Context Pty Ltd

Planners in both metropolitan and regional areas are increasingly finding they are dealing with issues involving Aboriginal cultural heritage management. This often occurs at a late stage in the planning process after permits have been granted, designs drawn and contracts let. The State Planning Policy Framework makes reference to Aboriginal cultural heritage but provides little practical assistance or guidelines to assist planners².

A workshop presented by Aboriginal Affairs Victoria on 3 October 2005 provided strategic, statutory, environmental and landscape planners, heritage consultants, Aboriginal heritage officers and land managers the opportunity to explore issues relating to the Victorian Planning System and Aboriginal cultural heritage. Presenters provided useful and considered perspectives from the point of view of heritage management and planning at the State government level and consultants dealing with heritage and planning matters. These perspectives were illustrated with a number of place-based case-studies showing how planning and heritage management processes can come into conflict.

Some valuable discussion emerged that is worthy of further analysis and dissemination to a wider audience of planners. To advance debate, I will present three of my own conclusions from the day:

1. Victoria's planning system provides a framework that acts independently, rather than in concert with the Aboriginal cultural heritage protection legislation, often with apparently conflicting outcomes.
2. Decisions which satisfy landowners and Aboriginal communities can only be achieved if planners recast their role as *facilitators of good land use outcomes*, rather than simply administrators of planning schemes, and seek to foster networks of dialogue and cooperation with State government agencies, landowners and Aboriginal communities.
3. Leadership is needed at the State level to provide a broader framework for dialogue between planning authorities and Aboriginal communities, to advance cooperation and to tailor the planning system to better address the unique issues surrounding Aboriginal cultural heritage.

In addressing these points I will draw on (but not attempt to summarise) the valuable content presented by the speakers at the workshop. I will also avoid detailed critical comment on the current Aboriginal cultural heritage legislation (the Victorian *Archaeological and Aboriginal Relics Preservation Act 1972* and the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*) as the State Government has indicated it proposes to introduce new legislation in the Autumn sitting of Parliament.

1. Victoria's planning system provides a framework that acts independently, rather than in concert with the Aboriginal cultural heritage protection legislation, often with apparently conflicting outcomes.

Together, the *Archaeological and Aboriginal Relics Preservation Act 1972* (AARP Act) and *Aboriginal and Torres*

Strait Islander Heritage Protection Act 1984 (ATSIHP Act) provide the legislative basis for protecting Aboriginal cultural heritage in Victoria. The ATSIHP Act (Part IIA) provides Aboriginal communities with significant decision-making powers to grant or refuse consent to 'deface, damage, otherwise interfere with, or do any act likely to endanger' an Aboriginal place or object (among other things). The AARP Act creates a register of Aboriginal sites and places.

The Victorian planning system also provides a relevant framework. Section 4(1)(d) of the *Planning and Environment Act 1987* has the objective to:

conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural, or historical interest, or otherwise of special cultural value.

This includes Aboriginal cultural values, as evidenced in cl15.11-2 of the State Planning Policy Framework (SPPF) which mandates that responsible authorities must take into account the AARP Act and the ATSIHP Act and the views of local Aboriginal communities. Various local councils have made attempts to formally recognise and protect Aboriginal cultural heritage through their planning schemes in the form of Municipal Strategic Statements (MSS), Local Policy, and in some cases, overlays. Valuable work in this area by the Cardinia, Casey, Greater Dandenong Councils and others was mentioned at the workshop.

The Commonwealth *Environmental Protection and Biodiversity Conservation Act 1999* (EPBC Act) applies to places on the National Heritage List (NHL) or on Commonwealth land. Aboriginal heritage places can be added to the NHL if they are considered of 'outstanding heritage value to the nation' because of special association with indigenous culture and traditions. There is presently only one such indigenous place recorded in Victoria.

Table 1 sets out existing legislation as it relates to the protection of post-contact³ (mostly non-Aboriginal) cultural heritage and Aboriginal cultural heritage in Victoria.

From a planner's perspective in the case of post-contact cultural heritage, the *Planning and Environment Act*, the *Heritage Act* and the *EPBC Act* set out a logical framework in which the significance of a place (local, State, national) defines the system under which impacts on that place are to be assessed. However, neither the ATSIHP Act (Part IIA) nor the *Planning and Environment Act* (through local planning schemes) sets out an equivalent framework for Aboriginal cultural heritage⁴. The result is that two sets of approvals processes often work in parallel, creating a context of apparent conflict and confusion. The implications of this for planners are many:

- Local governments and planners may be unaware of Aboriginal heritage values within their jurisdiction. Developments may occur which impact on important places or objects without consideration by or involvement of Aboriginal communities.
- Even in cases where an Aboriginal heritage place or object is identified in a planning scheme overlay (which very rarely occurs, but does in East Gippsland, for example, where the Mallacoota Midden Complex is covered by a Heritage Overlay), a planning permit does not equate to approval to disturb or interfere with the heritage values.
- A planner or planning department may think they are making a considered strategic planning decision (for example rezoning land for development) weighing up all considerations (environmental, heritage, infrastructure availability, etc.). However, failure to consult with Aboriginal communities and address their concerns means planning

Level of significance	Post-contact cultural heritage	Aboriginal cultural heritage
National	<i>EPBC Act 1999, Australian Heritage Council Act 2003.</i> Administered by the Commonwealth Department of Environment and Heritage via the National Heritage List .	<i>EPBC Act 1999, Australian Heritage Council Act 2003.</i> Administered by the Commonwealth Department of Environment and Heritage via the National Heritage List (criterion i).
State	<i>Heritage Act 1995</i> Administered by Heritage Council via the Victorian Heritage Register <i>some post contact places</i> <i>Archaeological and Aboriginal Relics Preservation Act 1972 (Vic) and Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth).</i> All objects and places protected. ← → <i>Planning and Environment Act 1987</i>
Local	<i>Planning and Environment Act 1987</i> Administered by local government via planning schemes (SPPF, LPPF, Heritage Overlay).	Via local planning schemes (SPPF cl15.11-2; local MSS, Local Policy and some Heritage Overlays).

Table 1 Existing legislative systems for managing cultural heritage in Victoria.

decisions can be undone if the community chooses to refuse consent for damage to heritage values (because they operate under a separate system, powers to refuse consent are not restricted by such things as the zoning of the land).

The two systems are not necessarily in direct legal conflict, however, they do provide parallel sets of rules which must be considered together. As one participant said “a licence to drive a car does not mean you are allowed to break the road rules”. However, without strategic guidance, this can create potential inconsistency and confusion that can cause costly and time-consuming delays, and put significant heritage places and objects at risk. For example, if a property owner with planning approval for a dwelling finds during or prior to construction that there are Aboriginal sites on the property, the *ATSIHP Act* is automatically triggered and Aboriginal communities must be involved. This could require further surveys, amendments to approved plans or potentially prevent the dwelling from being constructed altogether (although such an occurrence would be rare). This indicates another key factor in planning – the timeliness of heritage assessment.

2. Decisions which satisfy landowners and Aboriginal communities can only be achieved if planners recast their role to become facilitators of good land use outcomes, rather than simply being administrators of planning schemes, by fostering networks of dialogue and cooperation with State government agencies, landowners and Aboriginal communities.

Planners often find themselves confined by previous planning decisions made in ignorance of known or potential Aboriginal cultural heritage values. Case studies presented at the workshop discussed situations where historical zoning and subdivision had occurred in landscapes with extensive Aboriginal heritage values. This situation sets up a difficult context for planners in which existing development and zoning may be in conflict with Aboriginal heritage considerations.

However, limitations of existing planning schemes should not allow planners (or planning authorities) to wash their hands of Aboriginal heritage considerations. Planners need to think and act creatively to find a way to achieve better land use outcomes.

As is often the case, the issue lies in awareness and communication between parties.

While Aboriginal Affairs Victoria clearly has a role to play in disseminating information to local governments, there is an onus on planners involved in development assessment or strategic land use planning processes to take this information and, where high potential values or sufficient risk are

identified, facilitate discussions with and between landowners and local Aboriginal communities. This may also mean informing themselves and potential applicants of obligations under the cultural heritage legislation. This needs to occur early enough in the process to allow landowners and developers opportunity to accommodate concerns and prevent costly delays at a later stage. Such discussion should occur in every case that Aboriginal heritage is likely to be an issue, whether or not this is recognised in the planning scheme.

Despite acknowledged limitations on the extent and access to Aboriginal cultural heritage data, there is sufficient information available about what constitutes an Aboriginal heritage place or value (at least those with physical manifestations), and where these are known or likely to occur, to provide opportunities for planners to avoid or prevent mistakes from happening.

Ignorance or avoidance of the issue (because ‘its not in the scheme’ or ‘we haven’t been asked to consider that’) does not make the problem go away. The issues only become more costly and time consuming to address and more frustrating for landowners. To say nothing of the potential damage to places important to Aboriginal communities and impact on relationships between local government and Aboriginal communities.

3. Leadership is needed at the State level to provide a broader framework for dialogue between planning authorities and Aboriginal communities, to advance cooperation and to tailor the planning system to better address the unique issues surrounding Aboriginal cultural heritage.

There are unique challenges in Aboriginal cultural heritage for a land use planning system that relies upon drawing lines on a map to designate the occurrence of values. Tangible evidence of Aboriginal cultural heritage values is often revealed only through soil disturbance. Aboriginal Affairs Victoria estimates that less than 1% of Victoria has been surveyed for heritage sites (although its register contains approximately 28,000 entries). Furthermore, less tangible Aboriginal values of places and landscapes are passed down through generations of oral tradition. There are sensitivities amongst Aboriginal communities about divulging information on both kinds of values, but particularly those that deal special emotive or spiritual attachment to place contained in oral tradition.

Presently, Heritage Overlays are not adequately tailored to address Aboriginal cultural heritage. Heritage Victoria is right now reviewing the role of the Heritage Overlay as it pertains to places on the Victorian Heritage Register. Why not at the same time consider if and how the HO can be used to improve decisions related to Aboriginal heritage? There appears to be

a clear gap, and a real opportunity, to advance a system that works in tandem with improved cooperation between parties, and brings the planning system in to line with Aboriginal heritage legislation.

As one participant mentioned, under-resourcing of a system that can halt development in its tracks, and poor integration with existing approvals processes can set up a nightmare for developers and communities alike.

As the workshop showed, many positive steps have and are being made to encourage and improve communication between parties and achieve better outcomes and it is possible to develop some simple tools, through which local government can move towards a more holistic approach to acknowledging and protecting Aboriginal heritage. The Memorandum of Understanding between the City of Greater Geelong and the Wathaurong Aboriginal Cooperative is a model that sets out the obligations of both parties, including the circumstances in which Council will direct developers to undertake an assessment of potential impacts on Aboriginal values prior to development. Such agreements provide certainty to Council and developers that vexatious and onerous demands will be avoided, but just as importantly they empower local Aboriginal communities in management of impacts on their cultural resources, including steps to avoid or mitigate impacts occur, on their terms.

At present, processes like this are reliant on the goodwill and foresight of particular individuals and Councils rather than being the result of a coordinated approach.

The State Government should champion and fund work which allows the development of strategies that help translate the

concerns of communities into tools useful to planners. This is possible, but it requires sitting down with Aboriginal communities, earning their trust, listening and understanding their concerns, informing them about the needs of the planning system and inviting them to share ownership of outcomes. It also requires planning authorities to share their knowledge about land-use and development as well as helping Aboriginal communities gain better understanding of the operation of the planning system. After all, protecting Aboriginal heritage is as much about people and relationships as it is about places and objects.

1 Assistance on this article was provided by Joy Elley, Aboriginal Affairs Victoria.

2 From the summary brochure to the PIA Professional Development Seminar: Aboriginal Cultural Heritage and Victoria's Planning System, presented by Aboriginal Affairs Victoria, October 3rd, 2005.

3 Post-contact means the period after first contact between indigenous and non-indigenous individuals or communities (sometimes referred to as 'European').

4 Note that Aboriginal communities themselves tend not to differentiate 'levels of significance' and this is therefore consistent with the legislation. The exception to this is EPBC Act which specifies that the place must have 'outstanding heritage value to the nation' to be included on the NHL.