



Removing the Obstacles

Disability Access and the Arts
(in Heritage Buildings)



Project partners with Accessible Arts were: the Arts Law Centre of Australia, Arts Access Australia, and UTS Shopfront.



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Foreword

I am delighted to write a forward to the 'Removing the Obstacles' research paper. Accessible Arts NSW is fully committed to enabling better access to the arts for people with a disability and as such this paper forms part of the overall advocacy activities of the organisation.

Throughout Australia arts organisations are often located in and or are responsible for heritage buildings or including museums, theatres, community arts centres and gallery spaces. As arts organisations are developing their audiences and arts practises to be inclusive of people with a disability, they often feel they are unable to make any changes to these buildings due to their heritage characteristics.

This research paper is therefore timely given the upsurge of awareness of people with a disability, the ageing population and launch of the national *Disability (Access to Premises – Buildings) Standards 2010* that take effect on 1 May 2011.

The motivation for the research is to inform arts organisations interested in increasing access for audiences, participants, staff and arts professionals with a disability to heritage listed buildings. The research explores the disability and heritage laws that apply to arts organisations in providing access for people with a disability, and seeks to determine if there is a need to reform legislation.

Through investigating the relationship between heritage and disability discrimination legislation the research hopes to encourage and inform individuals and organisations that may hesitate to make accessible design changes to heritage listed spaces.

This research paper highlights three key inter-related issues regarding access and heritage. Additionally, as the research paper and the encompassing *Removing the Obstacles* project progressed, it became clear that the issues raised are not only applicable to the arts sector but have implications for the boarder community.

I commend the 'Removing the Obstacles' report to all those who are interested in the juxtaposition of heritage and anti-discrimination issues; a report that aims to highlight the challenges for further consideration and bring about clear, just and respectful solutions for all parties.



CEO, Accessible Arts

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Project Partners

Accessible Arts promotes full inclusion, access and opportunities in the arts for people with disability in NSW through advocacy, education and training. Accessible Arts provides many services including arts development, information, Disability Awareness and Access training and access development. Staff members provide services to organisations about how to make their venue and services more inclusive of people with disability, to arts workers working to establish or improve programs that enable people with disability to develop their creative potential, and to artists with disability who wish to further their practice.

The **Arts Law Centre of Australia** is the national community legal centre for the arts. It provides practical, specialist legal services and resources (including advocacy, publications and education) to artists across all art forms, and the cultural sector. The Arts Law Centre is a not for profit company limited by guarantee, whose vision is to 'foster a society which promotes justice for artists and values their creative contribution'.

Arts Access Australia is the national arts and disability organisation working with a network of State and Territory organisations and individuals to increase access and participation in the arts for people with a disability.

The **UTS Shopfront Community Program** links community organisations to the knowledge, skills, resources and professional expertise at the University of Technology, Sydney. UTS Shopfront facilitates, manages and supports community-initiated projects and community-engaged research with real social benefit.

Background

The project began as a response to arts and disability advocacy organisations that encountered confusion and at times resistance, from arts organisations in heritage buildings about their obligation to be accessible. Whilst the project was conceived in the arts and disability sector it has had many others involved, including those from the heritage, tertiary, government and private sectors.

The aim of this project was to investigate and if necessary, suggest changes to legislation related to the provision of access into heritage buildings. Whilst it is general in focus, it is hoped that arts organisations in particular will read the report and after doing so, aspire to take the next steps to provide or improve access to their service/organisation for people with a disability.

The scope of the project was restricted to physical access. It does not include the provision of other accessible features such as interpretive material, ticketing and websites. While acknowledging the importance of local government in providing access and preserving heritage, the research has primarily focused on state, territory, Commonwealth, and international policy and legislation.

The research and issues identified are timely and relevant given the March 2010 release of *Disability (Access to Premises – Building) Standards 2010*, the promotion of a *Social Inclusion Agenda* through the National Arts and Disability Strategy released in October 2009 and the forthcoming *National Disability Strategy*.

The research partners, led by Accessible Arts were UTS Shopfront (University of Technology, Sydney), the Arts Law Centre of Australia and Arts Access Australia. The project was assisted by a grant from the Law and Justice Foundation of NSW.

Key issues summary

Whilst people with a disability may wish to access buildings, they are often not provided the means to do so and are reliant upon those responsible to ensure access is provided. People with a disability frequently visit places with other people and can be an audience at the time that many businesses need patronage the most (such as during off peak and at other quiet times). People with a disability would like equal opportunity to go to venues, and are a valuable economic source of many businesses and organisations. By creating access for all people, arts organisations can maximise their opportunities for visitation and patronage.

The review of legislation and policy identified numerous general challenges in the heritage and anti-discrimination areas, and three broad issues specific to the inter-relationship of access and heritage:

- 1) The complexity of heritage and access issues requires more skilled and affordable professionals to assess access to heritage buildings, and a mechanism to monitor progress;
- 2) More information is needed to assist individuals/organisations regarding the application of the *Disability (Access to Premises – Building) Standards 2010* to existing heritage buildings;
- 3) ‘Heritage significance’ as a consideration in determining an ‘unjustifiable hardship’ defence to providing access requires clarification.

1) Complexity of heritage and access

There is a great deal of complexity of heritage and access considerations in applying standards, legislation and policy. This can easily become confusing and daunting for those who are not familiar with the terminology, or who have had no or limited contact in the past with either the disability or heritage sectors. Also, because there is some flexibility for case-by-case application in heritage and access issues, the individual circumstances of arts organisations and services often will require specialist advice and attention to their own situations.

Arts organisations vary in size and available resources. Specialist advice needs to be available, easy to find, and affordable, to encourage arts organisations to seek and utilise it.

In addition, regulations are changing and those involved across these sectors need to be up to date. To assist stakeholders to apply the requirements relative to their situation, there is value in a system that would provide clear principles to follow, coupled with easily available resources for guidance. Various organisations have developed and provide up to date resources and information and these will become more available as time progresses.

2) Access and existing heritage buildings

The legislation *Disability (Access to Premises – Building) Standards 2010* will take effect from 1 May 2011. The Premises Standards apply (generally) to buildings that are new (or a new or affected part of a building)¹.

This leaves out those who are in existing heritage buildings who have had any renovation work approved prior to 1 May 2011. Many existing buildings do not have disability access and unless an owner/occupier submits a development application that

¹ For details regarding the application of the Standards, refer to the Premises Standards Part 2.

enacts the Premises Standards, there is no legal requirement for access to be provided.

In addition, if a part of the building subject to a development application is leased to more than one person, a building certifier, developer or manager does not have to ensure that the affected part complies with the Premises Standards. Thus in many situations, it relies upon the goodwill of the owner/occupier to make changes to create access for people with a disability. One way to compel an owner/occupier to do so is via a complaint under disability discrimination law, however this relies upon a person with a disability to submit such a complaint, and for the process to result in an action that facilitates the provision of access.

Particular challenges lie in applying legislation like the *Disability (Access to Premises – Building) Standards 2010* in situations where a heritage listed building is involved. Thus, as linked to the previous issue, this complexity will require the development and retention of a skilled pool of people who can effectively assess, consult, devise solutions and monitor progress regarding the provision of access to buildings, and that also has the specialised knowledge of the heritage sector.

3) Heritage and unjustifiable hardship

There is often deliberation about the costs of heritage buildings regarding maintenance, restoration and potential alteration. The Disability Discrimination Act allows for someone to defend alleged discrimination to use the argument of 'unjustifiable hardship' (Clause 11). One of the factors that can be applied is the cost of making access adjustments is unreasonable in relation to their financial circumstances.

The *Disability (Access to Premises – Building) Standards 2010* also includes an unjustifiable hardship clause in that 'the loss of heritage significance' of the building (as so defined in Part 4.1 (I), p.12) is a consideration in determining if unjustifiable hardship applies.

However, there are examples that demonstrate that access and heritage considerations can co-exist. Some of these examples are provided in this report and there will be more once the Premises Standards and other legislation generates relevant cases. Many organisations and services undertake to provide disability access as a matter of understanding and valuing social equity, and in doing so acknowledge that all people in society are entitled to freely and easily enter public buildings and facilities.

Chapter 1: Introduction

1.1 Research Aims

Federal and state /territory anti-discrimination laws legally require buildings open to the public to provide physical access for people with a disability, yet there is also a legal requirement in federal, state /territory and local government heritage legislation to conserve the historical and cultural significance of heritage buildings.

This report is the culmination of work begun in 2007 that set out to examine and answer two questions:

1. Do heritage laws limit the capacity of arts organisations to provide physical access for people with a disability?
2. Is there a need for legislative reform?

Focusing upon law and policy in relation to disability access, and heritage, the report provides an overview of Commonwealth legislation and its impact, and a review of relevant state/territory, USA and UK legislation.

The report is not a practical guide with regard to access to heritage buildings; there are numerous resources available related to this, with more being developed in advent of new and updated legislation and policy. Sources of this information can be found from various sources and include:

- Australian Human Rights Commission (AHRC) <<http://www.hreoc.gov.au/index.htm>>
- Australian Federation of Disability Organisations <<http://www.afdo.org.au/>>
- Australia Council for the Arts - <<http://www.australiacouncil.gov.au/>>
- Department of the Environment, Water, Heritage and the Arts (Commonwealth) - <<http://www.environment.gov.au/>>
- Heritage Branch, NSW. <http://www.heritage.nsw.gov.au/01_index.htm>

It is important that if you are in a heritage building and would like more information about providing disability access (and how currently legislation applies to you), that you contact a professional that can assist you, and provide expert advice. Other sources of information can be found in the body and References section of this report.

1.2 Scope of the report

The Disability Discrimination Act 1992 applies to discrimination occurring in various areas of public life including employment, provision of goods and services, education and the administration of Commonwealth programs. Services are particularly relevant to the cultural and heritage sectors since they include the ticketing of events, exhibition design and captioning of exhibits, performances and interpretive material. However as this is a topic worthy of detailed attention and quite broad, goods and services are beyond the scope of this report.

This report, whilst written for arts organisations and services in heritage listed buildings, may be of interest to anyone located in a heritage building. In addition whilst the report reviews legislation that is applicable within and across Australia, there is a focus upon New South Wales.

Determining exactly how many arts organisations are located in heritage buildings is a challenge, however based on searches conducted with the [NSW State Heritage Database](#) (Heritage Branch, NSW, as at May 2010), there are over 430 listed arts-related heritage listings in New South Wales.

This figure is based on various searches using the individual criterion (with the number of relevant results in brackets): Gallery (46); School of Arts (98) - note that some are listed as 'former' and that a listed school of arts is not necessarily used for an arts purpose. They may also be called a 'Mechanics Institute', 'Literary Institute', or 'Athenaeum'; Theatre (96); Museum (111); Music, and Conservatorium (12); Art (65); Opera (2) and Playhouse (2). Not included are listings categorised as 'house', 'homestead', 'residence' or 'cottage' even though these may also be a location where art-related services/ collections or an arts precinct resides.

Other data shows that 'more than 65% of NSW's museums are housed in heritage listed buildings' (Rennie, S., Croker, A., Raymond, L., 2004, p. 5).

It is acknowledged that the research does not include many other barriers faced by people with a disability who wish to access buildings (whether or not to visit an art service or located in a heritage building). These can include negative and discriminatory attitudes by staff and other patrons; access to, in and around building fit-outs, access to programs, exhibitions, websites and ticketing of events, communication systems and a overall general lack of consideration or thought in planning, development and provision.

Whilst there are many issues and questions within the broad areas about access, heritage and disability, this report primarily focuses upon legislation.

1.3 Heritage Overview

1.3.1 What is heritage?

There are two categories of heritage generally: cultural and natural. Natural heritage refers to the physical forms of the land and sea environments. Cultural heritage encompasses the historical evidence, artefacts and beliefs of Aboriginal peoples; people who have had contact with the Australian continent; and people who have been born or settled here. The two categories are inter-related e.g. for Aboriginal people in particular Australia has cultural meanings that are inseparable from its natural values.

Types of cultural heritage include buildings, relics (both on land and in water), rural landscapes, or movable items. Built Heritage includes 'cathedrals and cemeteries, factories and fences, houses and hotels, museums and markets. It includes areas, precincts and streetscapes' (Heritage Branch NSW).

Legislative definitions of *heritage* derive from the **Burra Charter**, (see the Key Terms, Resources and Contacts section for more information) (ICOMOS, 1999). These sit within an agreed international framework. *Cultural heritage significance* means aesthetic, historic, scientific, social or spiritual value for past, present or future generations.

Built Heritage in context

A heritage listing can be initiated in a number of ways: a) by nomination, b) as part of a heritage study of a particular area or type of place, or c) because of a perceived threat to it, thus requiring protection.

Heritage buildings can be divided into three categories depending on their level of heritage significance (Rennie, S., Croker, A., Raymond, L., 2004, p.5):

- A non-heritage building is one that is regarded by the community as having low historical significance;
- A heritage building is regarded as having some aspects that are considered important or significant by the community.
- A heritage-listed building has been assessed by a national, state or territory heritage authority as having aspects that are so important or significant that it is considered essential to preserve it. Heritage-listed buildings are protected by heritage laws at the federal, state/territory and local levels.

In addition there are urban or local conservation areas where all buildings within a defined local area whether they have heritage significance or not, may be subject to regulation affecting their redevelopment.

Australian Heritage

Australia has a three-tier heritage management system whereby different levels of significance of heritage management are aligned to the three tiers of government.

Within this framework the Commonwealth Government manages heritage of national heritage significance, overseas (places of significance to Australia), world heritage and Commonwealth heritage. Local government bodies and the states manage heritage of local and state significance respectively, but both are under the auspices of state legislation. Legislation is applied at each level to identify, assess and manage heritage places.

Government, community and professional groups all maintain heritage lists. There are some lists that also identify special places and are not held by government, such as the National Trusts in most states and territories, the Royal Australian Institute of Architects, The Royal Australian Historical Society and Engineering Heritage Australia (DEWHA, 2008, p. 2; NSW Heritage Office, 2002, p.14).

Under Commonwealth law, the major legislative instrument is the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act). Following the amendments the EPBC Act, section 15B makes it unlawful for a person to 'take an action that *has, will have or is likely to have a significant impact* on the National Heritage values of a National Heritage place without approval ...'.

State and Territory Heritage

The Australian Capital Territory and the Northern Territory do not have a third tier of legislative protection at the local level for heritage, irrespective of the level of significance.

State and Territory legislation is broadly equivalent to the federal framework. For example under the *Queensland Heritage Act 1992*, s33, once a place is listed on the register, a development application needs to be made for any significant development work to be undertaken. However, if the development is of a 'minor' nature, the person can seek an exemption to the development application. Similarly the Victoria Heritage Act 1995 sets out actions which cannot be undertaken on a heritage place, listed on the Victorian Heritage Register, without a permit.

The prohibited actions contained in the NSW Heritage Act 1977 are similar. These actions cannot be undertaken on a heritage place (or building, work, relic, removable object, precinct, or land), where an interim heritage order applies or where it is listed on the State Heritage Register, without obtaining approval granted by the Minister for Planning. Section 57 of the Heritage Act prescribes a list of these prohibited actions, which includes demolishing the building or work; carrying out any development in

relation to the land on which the building or work is situated; altering the building or work; and more. When dealing with an application, the Minister is to take into consideration the extent to which the development or work done would affect the historical significance of any items of the environmental heritage.

Other states and territories have their own heritage legislation that attempts to balance heritage and community benefits in particular around the issues of adaptive re-use of heritage buildings. There appears to be a clear need for these state and territory laws to be harmonised as differences do exist.

Local Heritage

The NSW Heritage Branch's publication, *Local Government Heritage Guidelines* (2002) offers an overview of how the state and local governments of NSW work together to manage heritage in the state (p.11).

Local government is the authority that provides consent for the largest group of heritage places in Australia, and is recognised through local planning scheme heritage lists, conservation areas and heritage overlays. Local governments have a range of heritage responsibilities under state legislation to identify and protect heritage, as approval authority for development through the planning system and as an owner, manager or trustee of heritage places on behalf of the state. If there is a duplicate listing in both state and local government listings, the approval authority is with the state.

1.4 Facts about disability

1.4.1 What is a disability?

The definition of 'disability' under s4 of the Commonwealth *Disability Discrimination Act 1992* is broad and includes:

- Total or partial loss of the of the person's bodily or mental functions; or
- Total or partial loss of a part of the body; or
- The presence in the body of organisms causing disease or illness; or
- The presence in the body of organisms capable of causing disease or illness; or
- The malfunction, malformation or disfigurement of a part of the person's body; or
- A disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- A disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions, or judgement or that results in disturbed behaviour.

The definition in the DDA also recognises that a disability can be temporary and includes a disability that not only presently exists, but which has previously existed, or may exist in the future or are implicated to a person.

1.4.2 People with a disability

The Australian Bureau of Statistics (ABS) data (ABS, 2003) indicates that one in five Australians or nearly four million people self-identify as having one or more disabilities. An additional 21% (4.15 million people) indicated they had a long-term health condition that did not restrict their every day activities. This figure is an estimation based upon varying factors including self-definition (i.e. how people choose to fill out the census form, how they define the term disability), and that in accordance with the Commonwealth Disability Discrimination Act 1992, the definition of disability includes people with short-term disabilities lasting less than six months; the ABS excluded this group from the 2003 survey.

It is noteworthy that in the 2007-08 National Health Survey, over 1 in 3 people reported that they had a disability or long-term restrictive condition (e.g. arthritis, asthma, diabetes, circulatory conditions) (ABS, 2009). The data differs markedly from 2003 that states one in five people, and although it is noted that the data is from different sources and research processes it will be of interest to examine the next Census data to identify the number of people with a disability in our population.

In addition, there are a substantial number of people with a limiting or restricting health condition (including older people, defined by the ABS as over 60, who require some assistance – averaged 41% in 2003; this increased to 84% for the age group 85 or over).

In Australia we are facing an increasing population, ageing of our population and higher incidence of ill health; these factors have important implications for future planning, development and change in all areas.

1.4.3 What is discrimination?

The Commonwealth *Disability Discrimination Act 1992* (DDA) aims to eliminate discrimination against persons on the ground of disability, and ensure, as far as practicable, that people with a disability have equal rights. A further objective of the DDA is to promote recognition and acceptance within the community.

There are state and territory Acts equivalent to the DDA. Anti-Discrimination Acts in states and territories have their own jurisdictional limits. Accordingly, the relevant Act at the state level has no jurisdiction over a matter that involves a federal government agency or body.

While the DDA is the only piece of national legislation that deals exclusively with disability discrimination, equivalent Acts in states and territories are more general in nature and cover a wide range of prescribed attributes including disability, age, race, sex, pregnancy, marital status, religious or political association and etc. The range of attributes covered by the Acts is different for each state or territory. For a list of prescribed attributes covered by each state or territory, please refer to the *Summary of Federal and State Anti-Discrimination Law* at the AHRC website at http://www.hreoc.gov.au/info_for_employers/law/index.html.

Under section 5 of the DDA, a person (discriminator) is considered to have discriminated against another person (aggrieved person) on the grounds of a disability, if the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without a disability. There are two main types of disability discrimination:

Direct disability discrimination occurs when a person with a disability is treated less favourably than a person without a disability in the same or similar circumstances.

Indirect discrimination occurs when there is a rule or policy that is the same for everyone but has an unfair effect on a particular group of people (AHRC, nd, Information Sheet).

The definition and tests applied to determine discrimination are different in each state and territory. To determine whether a complainant has been treated less favourably than someone without the disability would have been treated, a complex process of comparison is adopted, taking into account the circumstances of the person and the situation.

1.4.4 Complaint Based Law

The DDA is a complaint-based law. The enforcement of its provisions requires people who consider themselves discriminated against or harassed because of their disability to lodge a complaint to the Australian Human Rights Commission (AHRC), formerly the Human Rights and Equal Opportunity Commission (HREOC). The AHRC is a statutory body set up to conduct public inquiries, negotiate disability guidelines and standards, support organisations to develop disability action plans and provide community education programs.

For people with a disability who feel discriminated against, the complaint process under the Disability Discrimination Act requires a complaint to be lodged, outlining the circumstances in which they believe their rights have been infringed e.g. they seek action regarding access to a heritage building.

Once a complaint has been lodged, the AHRC will commence an investigation process for those falling under the scope of the DDA. A conciliation process is likely to be arranged for the complainant and the respondent to reach an agreement. If an

agreement cannot be reached, the complaint will be heard by the Federal Court or Federal Magistrates Service (AHRC, *Information for people making complaints*).

The outcome of a complaint doesn't provide a legal precedent. A person with a disability may seek private legal recourse via federal court action, which can be costly and also traumatic. It is in the best interests of all concerned to avoid the need for a person with a disability to seek legal action and/or make a complaint.

Problems inherent with this system include: a) Settled/conciliated Australian Human Rights Commission cases do not provide legal precedents; and b) The complaint and conciliation based process relies on individuals having a negative experience and lodging a complaint before any provision of access is achieved. This represents a passive approach to addressing disability discrimination, as it requires those making a complaint going through an extensive process requiring fortitude, time, money and legal knowledge in order to negotiate access or alternatively face the option of funding a court case. If no complaint is put forward, there is little likelihood of change.

1.4.5 What is physical access and what are the rules in providing access?

Physical access is broadly defined as allowing the means for approaching, entering, communicating with or making use of something. For people with a physical disability access is defined by the Australian Federation of Disability Organisations (AFDO) as 'being able to get into and around buildings' in the *Access to Premises – Easy English Campaign Kit* (August 2007).

The provision of physical access to buildings is the subject of legislation, regulation and standards including the Disability Discrimination Act, Building Code of Australia and Australian Disability Access to Premises – Building Standards 2010. For example, under section 23 of the DDA, it is unlawful to discriminate on the grounds of disability in providing access to, or the use of, premises that the public can enter or use:

'A person must not be discriminated against because of the person's disability, or the disability of any associate:

- By denying access to or use of public premises;
- In the terms or conditions for entry or use of such premises;
- In the means of access to such premises;
- By denying the use of public facilities in such premises;
- In the terms or conditions for use of such facilities;
- By being required to leave such premises or cease to use such facilities.'

Some states, including NSW, do not have a specific section that deals with access to premises are covered under the nationally applicable *Disability (Access to Premises – Building) Standards 2010*.

Compared to the USA and the UK, Australia does not place the same level of positive onus on organisations, businesses or services to make themselves accessible. This has resulted in few binding legal decisions about disability access to buildings in Australia. However, this is likely to change once the application of the *Disability (Access to Premises – Building) Standards 2010* has resulted in some relevant precedents and examples to either use as best practice; to learn what not to do, or identify what isn't effective, gaps that still exists or those that have been newly created.

'Universal design, or access for all, is an overriding objective that should always be aimed for when upgrading a heritage place'.

Martin, E. and Gardner, J. 2008, p. 1

Regarding specific issues between heritage and access where there are either gaps or conflicts, many heritage building owners whose premises are open to the public have considered access issues, and there has been much work in the heritage industry to work with the disability sector in addressing some issues. In particular the Australian Council of National Trusts and Australian Heritage Council 1999 publication *'Improving Access to Heritage Buildings'* (Martin, 1999) was an important step.

The Australian Building Codes Board (ABCB) outlined a number of intended outcomes for people with a disability in the development of the new Premises Standards (2008-09, iv):

'It should also be recognised that many of the benefits that will be associated with the proposal are intangible in nature and are, therefore, not included among these quantitative estimates... Of particular importance in this regard is the expected substantial reduction in the extent of the social exclusion currently experienced by people with a disability because of barriers they face in accessing premises and, more positively, the substantially increased capacity for participation in society of people with a disability. These benefits will be of significance both to people with a disability and to the general population.'

Physical access is only one component of an overall organisational approach to access. In situations where physical access may not be possible there is still a great deal building owners and occupiers can do to ensure their exhibits, programs and events are accessible to everyone.

1.4.6 The costs of reasonable adjustments/ providing access

Many organisations resist making adjustments and/or providing for access for people with a disability due to a perception of high costs involved to do so. However, many do not do consider the additional income that more people will bring (i.e. not only from those with a disability but also from family members, friends, carers, and others). In

addition, whilst the cost of many building materials in Australia has increased, so too has the value of real estate and the assets that businesses/ organisations hold.

Invaluable too, is the positive marketing that can be generated from having a universally accessible venue. The goodwill demonstrated also generates positive outcomes, including financial ones. (Increased patronage from people with or without a disability who will go there because the organisation demonstrates social justice principles such as equality – remember the social, health, welfare and disability industries are large and so is the population connected to it!). Organisations and businesses will also gain a positive image; the benefits that can come from this are priceless.

As Guide No. 5 of the Resource Disability Portfolio, published by The Council for Museums, Archives and Libraries (2003) states, providing for reasonable adjustments is not as expensive as many might think. Guide No. 5 cites a report published by The Department for Work and Pensions entitled, *Costs and Benefits to Service Providers making Reasonable Adjustments under Part III of the DDA* (2002). Research results, based on 1,000 telephone interviews with service providers, show that:

- ☺ 'Approximately 40% of service providers report having made adjustments (63% in the public sector).
- ☺ Cost was hardly ever cited as a reason for not making an adjustment.
- ☺ More than half of the service providers had found it very easy or fairly easy to make the adjustment.
- ☺ For most kinds of adjustment the initial cost lay between £100 (A\$165²) and £1,000 (A\$1650).
- ☺ Ongoing costs for most adjustments were below £100 (A\$165).

In addition, 'The benefits cited include more accessible service, increased customer satisfaction, increased numbers of disabled customers, improvements to the external image, higher staff morale and benefits for customers in general' (p. 21). Guide No. 5 also provides the following information:

'Wise planning

[A] survey on access for disabled people in museums, archives and libraries in 2001 shows clearly that high performance in access for disabled people results from a planned approach. The survey was based on a sample of 430 museums, archives and libraries, and found the following:

- 86 per cent had equal opportunities policies that mention disabled people.
- 27 per cent had a disability action plan.
- 67 per cent had undertaken audits, of which 31 per cent had implemented all

² The currency conversion is approximate and subject to change.

- or part of the recommendations.
- 54 per cent had provided staff training.
- 56 per cent included expenditure for disability access in core budgets.

Organisations identified as 'high performers' (those who scored 85 or more out of a total of 125 indicators) are more than twice as likely to have a formal access plan for disabled people.

Nine out of ten high performers have carried out an access audit compared with less than a third of low performers.

Nine out of ten high performers have also received disability training, compared with less than a fifth of the low performing group.' (ibid, p.12).

Chapter 2: Legal overview – Heritage and Disability

Federal, state/territory and local government discrimination and heritage legislation and regulations are complex and disparate and would benefit from unification. However in Australia, the accepted principle is that federal legislation will override the states' if there is a conflict.

2.1 The Disability (Access to Premises- Building) Standards 2010

The *Disability (Access to Premises – Building) Standards 2010* is to be enforced from 1st May 2011. The 'Premises Standards' applies to new public buildings and parts of existing buildings undergoing renovation or upgrade including change of use, on or after 1 May 2011. The commencement date a year after publishing was to allow states/ territories time to adjust relevant laws to align with the changes.

The scope of the Standards and to what they do and do not apply is covered in Section 2.1 of the document. The exceptions, exemptions and concessions sections are quite large, encompassing Sections 4 & 5 of the Standards document. This includes 'unjustifiable hardship' in Section 4.1. In general, they do not apply to existing buildings unless they are undergoing new work.

There is direct linkage with the Building Code of Australia (BCA), so if a building complies with the BCA (as amended), it is envisaged to also comply with the Standards. However, whilst compliance with the BCA and the Premises Standards may be followed, there may still be scrutiny to determine if there has been breach of disability discrimination legislation, i.e. state law and the Commonwealth DDA.

The new Standards provide for greater access than previous versions including: improvements in symbols and signage, lighting, greater number and distribution of accessible spaces in cinema and theatres and increases in areas covered by hearing augmentation systems. Other areas covered by the document include lifts, stairs, ramps, toilets, footpaths and accessible paths of travel and circulation within buildings.

However, whilst the Premises Standards may include a wider range of disability access provisions, there is no requirement to provide them unless a development application is submitted. This is a potential limitation on application to heritage buildings, especially those that may undergo periodic maintenance and restoration (thus not require a development application).

For more information, see the AHRC website (Disability - Frequently Asked Questions section, and also via Disability – Buildings- Access to Premises. Also refer to the Key Terms, Resources and Contacts, and the References section of this report.

2.2 DDA, Heritage significance and Unjustifiable hardship

The Premises Standards and the DDA (Cwlth) both provide for 'unjustifiable hardship' conditions. Both aim for access requirements to be met to the maximum extent possible, notwithstanding individuals' case circumstances where these conditions can be applied.

Appendix One offers numerous case examples regarding unjustifiable hardship/breach of DDA law and heritage status. Some of these are cases heard in courts, and others are cases in which an Australian Human Rights Commission process has produced a resolved outcome. It will be some time before there are case examples available revealing how the new Premises Standards have been applied.

2.2.1 DDA And Unjustifiable Hardship

In determining what constitutes unjustifiable hardship for the purposes of the DDA, section 11 states that '...all relevant circumstances of the particular case are to be taken into account...' including:

- '(a) the nature of the benefit or detriment likely to accrue to, or be suffered by, any persons concerned;
- (b) the effect of the disability of a person concerned;
- (c) the financial circumstances, and the estimated amount of expenditure required to be made, [by the person claiming unjustifiable hardship]...'

The burden of proving that unjustifiable hardship exists, lies with the person claiming unjustifiable hardship.

Any heritage building or premises with a public function must provide access and is subject to the DDA. In addition, the listing of a heritage place on a statutory heritage register in Australia does not automatically amount to an exemption from compliance to the DDA (AHRC, 2010, Advisory Notes on Access to Premises).

There are exemptions under state and territory laws where such discrimination may not be considered unlawful, e.g. section 49M of NSW *Anti Discrimination Act 1977*, section 49C of the NSW Act, section 5 of the Queensland Act and section 58 of the Northern Territory Act. Each of these has specific conditions that must be met for this to be applicable.

2.2.2 Unjustifiable Hardship and the Premises Standards

The *Disability (Access to Premises – Building) Standards 2010* document considers loss of heritage significance as one of the considerations in determining unjustifiable hardship (see (I) below). Overall, there are approximately 18 factors that may be taken into account when determining unjustifiable hardship under section 4.1 including:

...‘(k) detriment reasonably likely to be suffered by the building developer, building certifier or building manager, or people with a disability or other building users, including in relation to means of access, comfort and convenience, if compliance with these Standards is required;
(l) if detriment under paragraph (k) involves loss of **heritage significance** —the extent to which the heritage features of the building are essential, or merely incidental, to the heritage significance of the building;
(m) any evidence regarding efforts made in good faith by a person to comply with these Standards, including consulting access consultants or building certifiers; ...’.

The *Access All Areas* report (Commonwealth of Australia, June 2009; Appendix One - Key Terms and Resources section), a June 2009 parliamentary inquiry into the Standards noted that ‘heritage value’ (subsequently changed in the Standards to become ‘heritage significance’) was not defined and required clarification, ideally to ensure consistency with state/territory heritage legislation. To counter confusion, national, state/territory and local heritage lists could provide consistent definitions of ‘heritage significance’ and heritage ‘classified’ buildings to be applied by the National Trust and professional institutions.

‘Organisations which occupy or are responsible for heritage buildings need to ensure that they have looked closely at alternative means of providing equal access, which are not prevented by heritage considerations. This may include:

#Taking advice from experts or organizations with relevant expertise on sympathetic means of altering heritage premises to provide access;

#Where the premises are used to provide goods or services, identifying alternative or supplementary means of providing access to those services...’

AHRC website, *Frequently Asked Questions: Access to Premises*, accessed 18 Nov. 2010

Some arts (and other) organisations meet their responsibilities very well, rather than avoid doing so and resulting in the need to have a situation addressed via the DDA complaints based process. By making changes that facilitate access, these organisations also generate and maintain a sense of goodwill in the community.

Some examples demonstrate what might be achieved, e.g. the Historic Houses Trust in Sydney installed signage for people with a disability to improve access and this has proven to be welcomed by those who can now move about more certain of where access points are located. The Sydney Opera House provide numerous services for people with a disability, provides resources and information for people with a disability

on the website <http://www.sydneyoperahouse.com/Visit/Accessibility_Info.aspx> and incorporates disability access into the organisation's policy and planning operations, e.g. Access Strategic Plan.

Another good example is demonstrated by the Art Gallery of Western Australia's *Disability Access and Inclusion Plan 2007 to 2012*. (The gallery occupies a precinct of three heritage buildings.) The development of their plan involved consultation with the public, staff and visitors to the Gallery who had a disability. The plan has outcome statements, an Action plan, has access audits scheduled in, and a committee of which the art gallery is a part reviews progress every quarter. Their efforts have resulted in the Gallery being recognised by a Certificate of Recognition award from the WA government and Disability Services Commission. The policy is on the art gallery's website in the webpage area entitled 'Plan Your Visit' – Access. <http://www.artgallery.wa.gov.au/plan_your_visit/access.asp>.

There are some international models from the USA and UK where the question of access and heritage is addressed in the context of a more proactive legislative framework, which will be useful in guiding Australian approaches. Some models, such as those from the United States and the United Kingdom are summarised in the following chapter.

Chapter 3: International Laws and Standards

3.1 USA legislation and guidelines

The USA legislation and guidelines provide a pro-active approach to accessibility for people with disability; the responsibility to provide physical access rests on organisations, not the individual. Further, the specific question of access and heritage has been considered and guidelines and case studies have been developed to make a broad range of heritage places, both listed and eligible to be listed, reasonably accessible.

3.1.1 USA Heritage Legislation

The National Historic Preservation Act (1966) legislation is intended to preserve historical and archaeological sites in the United States of America. The Act created the National Register of Historic Places, the list of National Historic Landmarks, and State Historic Preservation Offices.

3.1.2 USA Anti-Discrimination Legislation

There are three key federal laws used in the United States to achieve accessibility for individuals with a disability.

1. Architectural Barriers Act of 1968 (ABA)
2. Rehabilitation Act of 1973 (Rehabilitation Act)
3. Americans with Disability Act of 1990 (ADA) (Department of Justice, March 2009)

Architectural Barriers Act of 1968 (ABA)

The ABA applies to buildings constructed or altered, on behalf of, or for the use of the federal government that are financed in whole, or in part by a federal loan. It states as a requirement:

Cultural organizations that use federal funds to design, construct or alter a building must comply with a minimum level of physical accessibility.

(National Endowment for the Arts, 1994, p.16)

Rehabilitation Act of 1973 (Rehabilitation Act)

The Rehabilitation Act applies to public or private organisations that receive direct or indirect federal funding. It prohibits discrimination on the basis of disability in programs, services and activities provided by these organisations. It requires that:

Cultural organizations, private or public, that receive direct or indirect federal funds or federal financial support must make programs, services and activities accessible, including employment opportunities (ibid, p. 17)

Section 502 'establishes the Architectural and Transportation Barriers Compliance Board and gives the board authority to enforce the Architectural Barriers Act of 1968.'(loc.cit)

Section 504 of the Rehabilitation Act protects individuals from discrimination based on their disability. It prohibits organisations and employers from excluding or denying people with a disability an equal opportunity to receive program benefits and services. The section also prohibits against discrimination apply to accessibility, service availability, employment, delivery and the administrative activities and responsibilities of organisations receiving federal funds.

Importantly in the USA when anyone in receipt of federal funds must adhere to the federal disability discrimination legislation, organisations must appoint an s.504 coordinator to take responsibility for disability access. As an example of the impact of s.504 in the cultural sector, the National Endowment for the Arts provides detailed guidance on accessibility through a practical workbook designed to complement a more general resource 'Design for Accessibility: A Cultural Administrator's Handbook'

The booklet 'Design for Accessibility: A Cultural Administrator's Handbook' has many examples of best practice for cultural administrators in Chapter Two (pp. 23-30). In addition, it also has a Frequently Asked Questions section for cultural organisations that may employ a person/s with a disability, and need to consider what adjustments may be required. (National Endowment for the Arts, 1994. See References for website link).

Americans with Disability Act of 1990 (ADA)

Any organisation that serves the public, regardless of whether they receive federal funds or whether they are private or public must comply with the ADA in observing the civil rights for people with a disability.

The ADA prohibits discrimination on the basis of disability in regards to: aspects of employment (title I), state and local government services (title II), public accommodations and services operated by private entities (title III) and commercial facilities, transportation and telecommunications (title IV). Its purpose is to provide a national mandate for the elimination of discrimination against people with a disability;

and clear standards addressing such discrimination are enforceable by the federal government (ibid p.19).

3.1.3 Access and Heritage in the USA

In the USA, issues related to disability access and heritage have been considered. The cultural sector's approach is outlined in Chapter 4 - *Architectural Access to Historic Properties* in the *Design For Accessibility: A Cultural Administrators Handbook* (ibid.). As described on p 88 of this handbook:

'Solutions for accessibility should not destroy a property's significant materials, features and spaces, but should increase accessibility as much as possible....

Historic properties are not exempt from the ADA Accessibility Guidelines (ADAAG). The ADA requires barrier removal in historic buildings, if the removal is readily achievable. The ADA, however, takes into account the national interest in preserving significant historic structures. Barrier removal would not be considered 'readily achievable', if it would threaten or destroy the historic significance of a building or facility that is eligible for listing in the National Register of Historic Places under the National Historic Preservation Act ... , or is designated historic under state or local law.'

The U.S. Architectural and Transportation Barriers Compliances Board (ATBCB) is responsible for the development of guidelines to facilitate the implementation of the ABA and ADA, and has published two sets of guidelines:

- *ADA Standards for Accessible Design* (Department of Justice, 2010) that takes effect from 15 March 2012; and
- The *ADA Accessibility Guidelines* that apply to private non-profit and for profit organisations. (United States Access Board, 2010). In particular, these guidelines make provisions for standards regarding alterations made to qualified historic buildings and facilities. Specific topics covered by the ADA minimum standards include accessible route and entrance; toilets; and height of displays and written information.

3.2 UK legislation and guidelines

3.2.1 UK Anti- Discrimination legislation

Disability Discrimination Act 1995 (UK)

The Disability Discrimination Act 1995 (UK) places a pro-active or 'anticipatory duty' on service providers to know what could make it unreasonably difficult for people with a disability to use their services. Providing a disability Action Plan is one way that this requirement can be met. Organisations also must review policies, practices and procedures to ensure inclusive planning and application occurs so people with a

disability can use their services equally. The duty applies to anyone providing goods, facilities or services to the public, whether for a fee or not.

Regarding access to premises, Guide No. 5 of the Resource Disability Portfolio (Council for Museums, Archives and Libraries, 2003) states that:

'Service providers already have to provide an 'alternative method' for making a service accessible, where physical barriers prevent access to it. From October 2004, service providers may have to make changes to buildings and grounds to make services accessible. An online archive collection which meets web-accessibility standards is an example of an alternative method (see page 22).'

While the DDA 2005 still has its own complaint mechanism, there is an over arching positive duty on service providers and public authorities to make reasonable adjustments.

((The) Council for Museums, Archives and Libraries, 2003)

Disability Equality Duty (DED)

The Disability Equality Duty (DED) supported the DDA 2005. The DED came into force in December 2006 and applies to 45,000 public bodies across Great Britain.

This legislation aims to ensure that all public bodies, such as central or local government, schools, health trusts or emergency services, pay 'due regard' to the promotion of equality for disabled people in every area of their work.

Equality Bill (UK)

The Equality Bill (UK) was brought before British parliament in 2009. It imposes an equality duty for people with a disability, requiring every public body to actively look at ways of ensuring that people with a disability are treated equitably (Government Equalities Office, April 2009).

3.2.2 UK Building Regulations - Access to and use of Buildings

The DDA 2005 (UK) does not include standards for accessible building design though the relevant Codes of Practice refers to Part M of the *Building Regulations 2000* as a reasonable standard.

Building Regulations 2000

The *Building Regulations 2000* apply to England and Wales and were issued under the Building Act 1984. Part M (2004) provides guidance on meeting the requirements of the Building Regulations (Office of the Deputy Prime Minister, p. 5). Part M, which is a minimum standard, applies where 'an existing non-domestic building has been

extended, ... undergone a material alteration, or a material change of use other than to a dwelling or number of dwellings’.

Any departure from Part M must be justified by an **Access Statement** (ibid. pp 14-16). The Access Statement is a way of demonstrating that every effort has been made to provide an inclusive environment and that the applicant is not using it as a tool to justify lower standards of access provision.

The *Building Regulations 2000* incorporates British Standard 8300 (2001) ‘*Design of buildings and their approaches to meet the needs of disabled people – Code of Practice*’. This Code of Practice applies if:

- A non-domestic building or a dwelling is newly erected;
- An existing non-domestic building or dwelling is extended, or undergoes a material alteration; or
- An existing building or part of an existing building undergoes a material change of use to a hotel or boarding house, institution, public building or shop (ibid, p. 11).

British Standard 8300 (2001) Design of Buildings and the Approaches to Meet the Needs of Disabled People: Code of Practice explains how the restrictions that prevent people with disability from making full use of buildings can be anticipated and overcome. The extent to which British Standard 8300 (2001) apply to historic buildings is determined on an individual basis.

3.2.3 Heritage, Disability Discrimination and Access in the UK

The National Heritage Act 1983 (UK) established English Heritage, an executive non-departmental public body now sponsored by the Department of Culture, Media and Sport (DCMS).

English Heritage maintains more than 400 historic properties and monuments. It has completed disability access audits at these properties and developed action plans with implementation of recommendations underway. It has continued to develop an improved audit strategy and process, as well as to review, update and publish its ‘Properties Access for All Policy’ document (English Heritage, 2008).

English Heritage published *Easy Access to Historic Buildings* (1999) and includes:

1. An outline of the statutory framework;
2. Establishing an **Access Strategy** (incorporating the access audit, conservation assessment, the **access plan** and process, management issues and funding);
3. Making access improvements including practical advice and examples;
4. Resources including a Where to go for help section.

English Heritage established a Disability Action Group in 2010, comprising of staff at all levels of the organisation who are committed to disability and equality issues. The group meets three times a year and achievements to date have included:

- ✓ 'New guidelines for all English Heritage staff on how to produce accessible publications. (A much wider variety of publications available in alternative formats will also become available);
- ✓ Comprehensive access audit template looking at physical, sensory, intellectual access and customer care at all our sites, including family-friendly services
- ✓ Revised access guide which involved disabled people in its creation and which comprehensively covers physical, sensory and intellectual access.' (Available on the English Heritage website.)

British Regulations and Standards are supplemented by additional legislation like the *DDA 2005 (UK)* and Disability Equality Duty, requiring employers, service providers, and education institutions to make reasonable adjustments and place a positive duty on public institutions to make themselves fully accessible.

English Heritage assists organisations to meet the above requirements. An additional obligation is that any organisation making reasonable adjustments needs to first establish an **Access strategy**. An access strategy requires a strategic and high level commitment to making the whole organisation accessible with far reaching consequences beyond physical access to include sensory impairments and learning difficulties (English Heritage, 2008).

In summary, the UK approach to heritage and access for people with a disability is a commendable effort to balance the sometimes competing priorities in a pro-active and positive way, resulting in real improvements in disability access to heritage buildings. It is a model that could offer guidance to Australian legislators and the heritage, arts and disability sectors in the development of comparable legislation, policy and programs.

Chapter 4. Conclusion

4.1 Removing the Obstacles project outcomes

In 2007 when the research on this report commenced, the aim was to examine and answer two questions:

1. Do heritage laws limit the capacity of arts organisations to provide physical access for people with a disability?
2. Is there a need for legislative reform?

Since these aims were developed, the research has encompassed a broader scope and considers developments in Australian building regulations and standards, and examines legislation, standards and models of disability access, building standards and heritage in other continents.

With regard to the first question, heritage, building and discrimination laws have exclusions or aspects that may be applied if special circumstances exist. These may be incorporated into legislation as 'unjustifiable hardship' provisions which acknowledge that each situation involves individual and unique circumstances, and to apply legislation in a blanket form would be often unfair.

Applying the laws, given that they provide this flexibility, can produce variable outcomes. Whilst it may seem that in some cases applying the hardship provisions results in some organisations/ services escaping their obligation to provide access, in other cases the provision of access in some form may be enforced if subject to a disability discrimination complaint.

The complexity of the legislation and policy with regard to disability and heritage may not instil confidence in arts service/ organisation staff to make changes to their building, especially if they are not familiar with either the disability discrimination or heritage areas.

However at the very least, once individuals or organisations are aware of their obligations, they may be encouraged to seek further information about providing access. Owners, managers and others are also more likely to understand that the existence of heritage significance is not a barrier to explore the options to provide disability access, and that once their individual circumstances are assessed, alterations for access could be made.

A lack of capacity to provide access may be attributed in part to limited understanding and knowledge, and whilst there are some restrictions and limitations in how and what changes may be made to heritage buildings, the laws in themselves do not limit the capacity to make any change to improve physical access, or to take the steps to find out how.

The provision of easy to understand information to those located in heritage buildings may be the first step in increasing the number of buildings that have access. Connecting people with the relevant resources and contacts to assist them, will build their capacity to make changes, and to provide or improve the physical access to their building.

There is certainly some scope for legislative reform, in that there are amendments that could be made that strengthen current protection for people with disability, and provide more resources and support for those that wish to alter their heritage building.

The following recommendations go beyond addressing these research questions regarding legislation, and endeavours to stimulate thinking and action in a range of related areas.

4.2 Recommendations

A/ Legislation, Policy and Guidelines

Recommendation 1: Unjustifiable Hardship in the DDA and Standards

1a) That the definition of “unjustifiable hardship” which applies throughout the DDA be made clear under section 11, or section 23 of the DDA. In doing so, “heritage” status of a building must not automatically lead to the raising of the “unjustifiable hardship” defence.

1b) The *Access to Premises Standards 2010* should be amended to ensure that the heritage status of a building does not in itself lead to invocation of the “unjustifiable hardship” defence.

1c) That any deviation from the conditions of either the DDA or the Premises Standards require a publicly available Access Statement, similar to the Statement required in accordance with UK legislation (see pp.27-8 of this report).

Recommendation 2: Access Strategy and Access Assessments

That agencies (funded via government and privately) in heritage buildings be required to have an Access Strategy, demonstrating a strategic and high level commitment to making the whole organisation accessible beyond physical access; this would also include for sensory impairments and learning difficulties.

In addition, that organisations be required to undertake Access Assessments as per the UK approach and the requirement that organisations also have an Access Statement. The *British Standard 8300 (2001)* in Approved Document Part M applies to access in existing buildings and importantly, an Access Statement must justify any departure from Part M. The Access Statement is a way of demonstrating that every effort has been made to provide an inclusive environment.

Recommendation 3: Change DDA to compliance based legislation

That Australia adopts a more compliance-based approach to disability discrimination law whilst still retaining the right of an individual to complain. The U.S. approach is a potential model for future law reform in Australia. It provides a compliance-based approach to resolve the issues regarding the provision of access for people with a disability and the need to preserve heritage sites.

The benefits and merits of a more proactive approach, such as that adopted in the US, demonstrate legislation in which the burden is not placed on the person with disability, but upon the owner of the premises.

Recommendation 4: Information about creating access to existing buildings

That more resources and information be directly provided to arts organisations and services located in heritage buildings - to increase knowledge and understanding about how access can be achieved in and around existing buildings.

Recommendation 5: Heritage significance definition

In the *Disability (Access to Premises – Building) Standards 2010*, the term ‘heritage significance’ is defined as the ‘extent to which the heritage features of the building are essential, or merely incidental, to the heritage significance of the building’ (Section 4.1 (l)).

This definition, particularly the measures of ‘essential’ and ‘merely incidental’ should be clearly defined; it is subject to wide interpretation by those who will need to adjudicate and likely to result in broad inconsistencies in its application. In addition, easy to understand guidelines should be developed to facilitate consistent use, and should be applicable across national, state/ territory and local boundaries.

B/ Services, Resources & Tools

Recommendation 6: Access Coordinators

That Australia adopts a similar approach to that of United States with regard to access coordinators, i.e. anyone in receipt of federal government money must adhere to the

federal disability discrimination legislation; organisations need to appoint an s.504 coordinator to be responsible for managing the accessibility requirements of that organisation under law (Rehabilitation Act 1973).

C/ Leadership and Communication

Recommendation 7: Monitoring body for compliance/ access audits

To monitor, support and enforce the provision of disability access, an organisation or body to monitor compliance/access audits should be established, or this authority be provided to an existing independent body. In addition, this authority should include the function of undertaking disability access audits and develop action plans with recommendations for implementation.

D/ Funding

Recommendation 8: Funding for heritage/ access provisions

8a) That much more funding be made available by government to those located in heritage buildings who wish to provide or improve the provision of access for people with a disability.

For example, local and state governments could develop a funding program such as the Australian Commonwealth government's National Historic Sites grants program, to cover state, regional or local needs (see Appendix 2, Section B). Funding programs such as this could facilitate the planning, development or reviewing of access plans or an access policy such as English Heritage's 'Properties Access for All Policy'.

In addition, funding could contribute toward projects that involve the employment of an access consultant, or incorporating access into a business plan, visitor management plan, or developing an Access Policy.

These specific and specialist types of services are necessary to assist those in heritage listed buildings, given the complexity of heritage, building and disability access laws and policy.

8b) That more funding is made available all levels of government to assist the building industry with making alterations and meeting requirements to existing buildings, particularly those located in heritage buildings.

8c) That staff of government, and the disability, heritage and arts sectors continue to support and inform arts organisations in heritage buildings of the opportunities to access funding opportunities, and for the latter stakeholders to lobby government for more funding to enable the dissemination and expansion of resource material.

Recommendation 9: Funding for more Access Auditors/ Assessors

Adequate resources are required to plan, develop and implement a national program to facilitate Recommendations 2 (Access Strategy), 6 (Access Coordinators) and 7 (Monitoring compliance). However, the small number of people skilled in both access and heritage in Australia that can provide timely advice in this area can be challenging for arts organisations to locate and afford.

The model demonstrated by the UK, in requiring an Access Strategy and an Access Statement should be strongly considered. New and up to date resources such as examples of Access Plans (as provided by English Heritage) and people to provide guidance, support and advice are necessary for those needing, and wanting, to make changes to their building to enable people with a disability to access it.

4.3 Future considerations

The implementation phase of new legislation such as the *Disability (Access to Premises – Building) Standards 2010* will test this new environment for the building and disability sectors.

In the coming years there will be opportunities to review the issues that have arisen in the course of their implementation and to make any adjustments as required. These issues will serve as good topics for future research, and pave the way for necessary amendments to legislation and policy.

Improvements to access via legislation, policy and in practice will continue to be made and organisations in many sectors demonstrate a strong commitment to address the difficulties that those with a disability face.

There is still a long way to go and there is always the opportunity to do more, and as much as we can.

Appendix 1: Discrimination & Heritage – Case examples

A/ Legal precedent

A1/Federal Case Law

At the time of researching cases for this report, there are none in the Federal Court and federal Magistrates Court in which heritage has been raised as a defence of 'unjustifiable hardship'. As a result there is a lack of precedent in Australian Courts establishing whether heritage significance may be used as a basis for unjustifiable hardship.

Nonetheless, the term unjustifiable hardship is defined in the court in various instances, for example, that it

- '... connotes more than just hardship' (1) and
- '... may in some circumstances justify financial burden' (2).

From legislation:

(1) Finney v Hills Grammar School (1999) HREOC 14 at 52; Hills Grammar School v HREOC & Ors (2000) 100 FCR 306; Francey & Anor v Hilton Hotels (1997) EOC 92-903 at 77,453; Access for all Alliance Inc v Harvey Bay City Council [2004] FMCA 915, par 84;

(2) Francey & Anor v Hilton Hotels (1997) EOC 92-903 at 77,453.

A2/ State Law – WA Case example

Shire of York and Equal Opportunity Commission

This example from Western Australia did not resolve the question of heritage significance as a basis for claiming unjustifiable hardship, however it is worth noting. In the case *Shire of York and Equal Opportunity Commission* ([2008] WASAT 9, 2 May 2008), the Shire of York (the applicant) applied for exemption from sections 66J and 66K of the Equal Opportunity Act 1984 (WA).

The Tribunal made an interesting finding in relation to the town hall's heritage significance when considering if there was discrimination in the provision of access to places. Under s.66J, in relation to the provision of access to places and vehicles, discrimination on the ground of impairment was not unlawful:

The Tribunal found that the Town Hall was constructed some time before 1911, before the relevant regulations and the Building Codes of Australia Part D3 came into effect and it is not subject to the requirements in the Code. As a result, s.66J applied and hence there was no discrimination on the ground of impairment in relation to access to a public place.

The Shire of York was then caught under s.66K (1) in relation to the provision of goods and services. Although a claim of 'unjustifiable hardship' in respect of financial burden was raised, it proved hard to demonstrate the claim. The heritage significance of the town hall was not raised as a circumstance contributing to or constituting unjustifiable hardship.

The exemption was sought because the upper floor of the York Town Hall is not wheelchair accessible. The York Town Hall was officially opened in 1911, and is recognised by the Heritage Council of Western Australia as a building of cultural heritage significance and heritage listed.

In this case, the Tribunal found that the applicant imposed on people wanting access to the upper floor of the Town Hall the condition that they do so via the staircase. **On the issue of unjustifiable hardship, the Tribunal was not satisfied that the exception of financial hardship applied**, even taking into account that the cost of a lift was approximately \$70,000, plus \$40,000-\$50,000 for installation and construction costs. The applicant was granted an exemption for a period of two years on condition that it take all reasonable steps to secure, or make available, funding for the installation of a lift.

The case of *Shire of York* reinforces significant findings of this research. Firstly heritage legislation, either federal or state, does not automatically make any action or development work undertaken on heritage buildings unlawful; it only means that necessary approvals must be obtained. Secondly, whether heritage significance will or will not constitute a ground for finding of 'unjustifiable hardship' is yet to be determined by a court.

A3/ Case example - local government

Local governments have a critical role to play in ensuring that the DDA is complied with. Two examples of access and heritage cases were found. While neither specifically cites heritage significance as a reason not to provide access, these two local development applications decided by state and territory courts show a compromise can be reached that addresses both heritage conservation and the provision of access.

In *BT Goldsmith Planning Services Pty Ltd v Ashfield Municipal Council* ([2007] NSWLEC 532) a development application to alter and add to an existing dwelling house to use the ground floor as a childcare centre was refused by the Ashfield Council in New South Wales.

One of the grounds for refusal was that the proposed childcare centre failed to provide disabled access as required by the Building Codes of Australia (BCA) and Australian Standard AS1428.1. Another reason for refusal was that the proposed commercial use of the property within a residential area detracted from the character and heritage

significance of the Haberfield Heritage Conservation Area and was incompatible with the purpose of 'separation of land uses'.

In regards to wheelchair accessibility, the applicant responded by proposing to build ramp access to the porch and a wheelchair accessible path to go from the accessible car space to the front footpath. The court then held that the commercial use of the land would not significantly detract from the significance of the heritage conservation area. Consequently, the court found no reason to refuse the application.

In *Royal Park Protection Group Inc v Melbourne CC* ([2007] VCAT 1380), the development, sought to be undertaken in a Victorian heritage area, included as its purposes to improve disability access to the car park and bus drop-off/pick-up area. The development involved removing trees and relocation of the unsealed bus parking area to an existing sealed car park area. The Victorian Civil Administrative Tribunal (VCAT) considered the significance of the heritage area and decided that the proposed work to improve disability access would 'enhance the appearance of the heritage area'. The development was therefore approved on the grounds that it is considered appropriate to 'upgrade it in a contemporary way to serve the general community'.

B/ Individual Complaints and Conciliated Outcomes

B1/ AHRC on Access and Heritage

Heritage issues and the defence of unjustifiable hardship have come as cases before the Australian Human Rights Commission (AHRC), which did not proceed to a decision (AHRC, 2009, DDA Conciliated Cases: Access to Premises).

There has also been several precedents established in which heritage significance is used as a defence for not providing access for people with a disability.

B2/ AHRC Case examples

The following examples of 'Conciliated outcomes' from the Australian Human Rights Commission's website illustrate how access can be negotiated without the need for litigation (though without providing any binding precedent).

The first example from 2004, concerned a woman who used a wheelchair. The woman complained that she had been unable to access a Sydney coffee shop as both entrances had steps. The respondent stated that there were barriers to providing access as the premises had heritage significance, but agreed to raise the matter with the Australian Heritage Commission (which provides information on upgrading heritage premises for access). The complaint was settled with an agreement to provide ramp access at one of the entrances.

The second example (1998) involved a man who used a wheelchair complained that a recently renovated restaurant did not have adequate access. The restaurant owner indicated that the building had heritage listing, and that local government planning processes had given approval for the renovated premises without compliance with the disability access requirements of the Building Code. This was on the basis that modifications to the front entrance to render it accessible would be inconsistent with heritage requirements. Furthermore, the restaurant owner claimed that there was insufficient space to achieve equal access, given narrow doorways and the fact that installation of side door ramp access would take up car parking space and breach local government requirements. The matter was settled after a conciliation conference. The restaurant owner agreed to seek approval for modifications to provide side door ramped access and the provision of a disability car parking space.

The third example (1998) concerned a woman with a physical disability who complained she was unable to use a Commonwealth Government service provision office that had steps at the entrance and inside the heritage premises, as well as heavy front doors. Ramp access was provided with heritage approval though the respondent claimed it was impossible to replace the existing doors because of their heritage significance but proposed to modify them to ensure easier access. The matter was ultimately settled when heritage approval for automatic doors was also requested and obtained.

These three cases highlight how positive changes can result through the conciliation process.

Appendix 2 - Key Terms, Resources and Contacts

A/ Disability/ Access to buildings

'Access All Areas'

This is a report of an inquiry into the *Draft Disability (Access to Premises- Buildings) Standards 2010*. The House Standing Committee on Legal and Constitutional Affairs considered and reported on issues including:

- The appropriateness and effectiveness of the (at the time proposed) Standards in achieving their objects;
- The interaction between the Standards and existing regulatory schemes operating in state and territory jurisdictions, including the appropriateness and effectiveness of the proposed model process to administer building access for people with disability;
- Whether the Standards had an unjustifiable impact on any particular sector or group within a sector.

Further information and the *Access All Areas* report is available on the Parliament of Australia, House of Representative website:

<http://www.aph.gov.au/house/committee/laca/disabilitystandards/index.htm>

Disability Discrimination Act 1992

The Commonwealth's anti-discrimination law, Disability Discrimination Act 1992 (DDA), provides protection for Australians against discrimination on the basis of disability. Further information on the DDA can be found at the Australian Human Rights Commission website: http://www.hreoc.gov.au/disability_rights/

'The Good, the Bad and the Ugly: Design and Construction for Access', Jan 2009 (CD release), Australian Human Rights Commission. This CD highlights 14 examples of common problems and misinterpretations in applying the Building Code of Australia (BCA) with regard to providing access for people with a disability. A guideline is also provided on improving access to buildings and services.

'National Arts and Disability Strategy'

The National Arts and Disability Strategy sets out a vision for improving access and participation in the arts and culture sectors for people with a disability.

The Strategy sets out eight underlying principles that will guide its implementation, and address issues including the right for all Australians to have access to, and participate in arts and cultural activities, and the need for people with a disability to be involved in the decisions that affect them. Four priority areas identified for action are:

1. Addressing barriers to access and participation;
2. Supporting artistic and cultural practice amongst those with a disability;

3. Developing audiences for disability arts companies and individual artists; and
4. Improving policy development and planning within governments.

The document is available on the Cultural Ministers Council website: http://www.cmc.gov.au/working_groups/national_arts_and_disability_strategy

'Introduction to Access'

This is a fact sheet from Museums and Galleries NSW (MGNSW) – ph. (02) 9358 1760, free call (regional NSW only): 1800 114 311.

National Disability Strategy

In 2007 the Australian Federal Government made a commitment to develop a National Disability Strategy. This strategy is due for release in late 2010/early 2011.

The aims of the National Disability Strategy are to increase the social, economic and cultural participation of people with disability, to eliminate the discrimination experienced by them and to improve disability support services for them, their families and carers. For further information visit the Australian government's Department of Families, Housing, Community Services and Indigenous Affairs website, via the People with Disability-Publications-Policy and Research sections:

<http://www.facsia.gov.au/sa/disability/pubs/policy/Pages/default.aspx>

United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)

The purpose of the UNCRPD is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all people with a disability, and to promote respect for their inherent dignity.

The Convention was adopted on 13 December 2006 at the United Nations Headquarters in New York. The Australian Government signed the Convention on the 30 March 2007 and Australia ratified the Convention on 17 July 2008. It is available on the United Nations website: <http://www.un.org/disabilities/>

B/ Heritage/ culture websites and resources

Burra Charter

The Burra Charter is the Australia International Council on Monuments and Sites (ICOMOS) charter for the conservation of places of cultural significance. The Charter sets a standard of practice for those who provide advice, make decisions about, or undertake works to places of cultural significance, including owners, managers and custodians. The Charter is available from various websites: search for 'Burra Charter'.

Heritage Significance

A publication from Heritage Branch NSW, *Assessing heritage significance* (2001) is available on the Heritage Branch NSW website via the *Publications and Forms* section.

National Historic Sites grants program

This is a funding round available to assist owners and managers to maintain and conserve the heritage of nationally significant historic heritage sites.

For three funding periods from 2010-2011, funding will be available for projects that include 'building long-term sustainability of, or enhancing public or tourist access to significant sites. Whilst eligibility is limited to places listed, or actively considered for listing on the National Heritage List; or be a historic heritage place of national significance (i.e. already included on a state heritage list or the Commonwealth Heritage List), applicants may utilise this funding for projects that establish or enhance disability access.

Whilst funding will not be approved for the purchase of assets, (and plant and equipment purchase is limited up to a value of \$2,000), this funding could be utilised by arts organisations in eligible buildings to plan, develop or review access plans, or tailor and implement policies such as English Heritage's 'Properties Access for All Policy'.

In addition, it may contribute to a project that includes employing an access consultant, including access as part of a business plan or visitor management plan. Further information is available from the Heritage Division of the Commonwealth Department of the Environment, Water, Heritage and the Arts (Heritage Department's) web page: <http://www.environment.gov.au/heritage/>

'Just because it's old: museums and galleries in heritage buildings'

Written by Rennie, Croker, and Raymond in 2004, this publication is available from the Museum and Galleries NSW (MGNSW).

C/ Access and heritage:

'Improving Access to Heritage Buildings: A Practical Guide to Meeting the Needs of People with Disabilities' by Eric Martin, 1999, Australian Council of National Trusts, Australian Heritage Commission, Canberra. This guide to improving access to heritage buildings is available from the Australian Heritage Council's website via 'Publications – Books and Reports'.

<http://www.environment.gov.au/heritage/ahc/publications/index.html>:

'Access for All to Heritage Places', written by Eric Martin in 2008 for Heritage Victoria is a technical leaflet and offers a handy checklist. Note that that measurements and standards in this edition may need adjusting to comply with the updated *Disability (Access to Premises – Building) Standards 2010* that commence from 1 May 2011; an updated version of this leaflet will be available in the future which will be in accordance with new legislation and policy. Available via the Department of Planning and Community Development (Victoria government) website via Heritage -

Publication and Research – Technical Information:

<<http://www.dpcd.vic.gov.au/heritage/publications-and-research/technical-information>>

D/ Organisations

Accessible Arts NSW. Accessible Arts promotes full inclusion, access and cultural opportunities in the arts for people with a disability in NSW. Accessible Arts provides many services including arts development, access consultation, art programs coordination and strategic planning and development. Staff members provide advice and consultancy to organisations about how to make their venue and services more suitable for people with a disability, and to assist them with issues relating to accessibility. Ph. (02) 9251 6499, or find information on the Accessible Arts website at <www.aarts.net.au>.

For details regarding other arts/disability organisations across Australia, see the Links page on the Arts Access Australia website: <<http://www.artsaccessaustralia.org/>>

Association of Consultants in Access Australia Inc. (ACAA) - Ph. (03) 5221 2820. The website <http://access.asn.au/> offers an on-line directory to locate access consultants.

Australian Heritage Council is a body of heritage experts established by the [Australian Heritage Council Act 2003](#). The Council plays a key role in assessment, advice and policy formulation and support of major heritage programs.

The **Australian Human Rights Commission (AHRC)** – ph. (02) 9284 9600, www.humanrights.gov.au has a great deal of information in the Disability Rights area, including Action plans, and Access to Premises. Also see the AHRC's *Disability Rights—Frequently Asked Questions* section.

Australian Institute of Architects (AusIA), (NSW Chapter - ph. (02) 9246 4055). The AusIA site has a policy about Heritage, and Universal Access - <http://www.architecture.com.au/>.

Centre for Accessible Environments (CAE) (UK) – A registered charity, CAE provides advice and guidance on inclusive design and access to the built environment for disabled and older people. Website available at: <<http://www.cae.org.uk/index.html>>

English Heritage is a mostly government funded organisation in the UK that manages numerous historic sites including ancient monuments and historic buildings; the organisation is a lead advisory body to the government regarding the historic environment and has a statutory role in the planning system. Website: <<http://www.english-heritage.org.uk/>>

Heritage Branch NSW, Department of Planning assists the Heritage Council of NSW in administering the NSW Heritage Act, 1977. It is the peak heritage agency for the New South Wales Government: <www.heritage.nsw.gov.au> - ph. (02) 9873 8500, email: <heritage@planning.nsw.gov.au>. The website has a directory of state-wide Heritage Consultants, and a Products & Services Directory – see the Conservation and Technical link from the Home web page: <www.heritage.nsw.gov.au>.

Also from this path, you can find information about Fire, Access and Services as related to heritage buildings, and in particular about **FASAP**. Members of FASAP (Fire, Access and Services Advisory Panel) can provide expert advice (via application) to help achieve acceptable compliance with current building standards and retain the heritage significance. Contact the Executive Office via the Heritage Branch for more information.

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