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Introduction

The Removing the Obstacles Access and Heritage Buildings research project is a work in progress.

Structure

- 1) **About the Research Project – why, who and what**
- 2) **What we found**
- 3) **What happens next**

All of this would have been a longer presentation discussing in detail why exactly access to heritage buildings is an issue though as I'm sure most of you will be aware last week the Government launched the Disability Standards for Access to Premises which has cleared up some of the contextual issues around access generally though not specifically addressed many of the concerns we have identified around heritage so there is still plenty to talk about.

1) **About the Project – why, who, what**

Why - Accessible Arts NSW are one of only two states in the Arts Access Australia network with a staff position responsible for access and audience development i.e. attending arts events. Through their work Accessible Arts were identifying resistance to access from arts organisations located in heritage buildings who claimed that heritage value meant they didn't have to be accessible. Now this is particularly an issue for arts and cultural organisations as many are based in heritage buildings (adaptive re-use) and they are also rarely the owners of the buildings. We also felt that access and heritage concerns could co-exist though there wasn't much we could find to demonstrate this.

Who – Accessible Arts then put a team together in 2007 which included The Arts Law Centre of Australia, Arts Access Australia and University of Technology Sydney (UTS) Shopfront. UTS Shopfront places student researchers with community organisations and as the project team had no cash the student contribution has been especially valuable and deserved great acknowledgment. Accessible Arts were then successful in obtaining a grant from the NSW Law and Justice Foundation

What – The ‘Removing The Obstacles’ project set out to answer two questions:

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

It quickly became clear that the research was relevant to all heritage buildings open to the public and while we have identified some key issues and thoughts about how to address them the definitive need for a legislative reform agenda is one we’re considering further in light of the launch of the Access to Premises Standards.

We also undertook some comparative research to look at USA and UK approaches to access and heritage. I won’t be going into any detail about this though suffice to say they have both considered access and heritage issues within the context of a stronger anti-discrimination legislative framework that places a positive onus or obligation on building owners, tenants and managers to be accessible. They have each developed guides to access and heritage issues and it is easier to find examples of good practice.

The research identifies issues for further consideration and is in effect a ‘green paper’ for stakeholder engagement and collaboration to determine possible solutions that balance and provide guidance on the connections between heritage and access. In particular as a small project team of arts organisations we see a vital need to engage the heritage sector in devising access solutions building on their considerable expertise, capacity for innovation and experience in adapting the built environment to provide access. The point of this research and proposed stakeholder forum is to build partnerships and bring stakeholders with us rather than draw a line in the sand.

What is a heritage building

Within the three tiers of Australian Government local government manages the largest portfolio of heritage places in Australia. Heritage places protected by local government statute comprise more than 76 000 historic heritage places and 1770 historic areas.

Local governments have a range of heritage responsibilities in complying with 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.

Heritage buildings can be divided into three categories depending on their level of heritage significance.

1. A non-heritage building is one that is regarded by the community as having low historical significance.
2. A heritage building is regarded as having some aspects that are considered important or significant by the community. For example the National Trust maintains a register of heritage 'classified' buildings and other items though the Trust's Register has no legal force.
3. 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, whether they have heritage value or not, within a defined local area may be subject to regulation affecting their redevelopment.

2) What we found

Historical confusion

In general there has been confusion generated by differences between access (anti-discrimination) legislation and heritage legislation respectively between federal, state and territory governments.

For example on the access, or anti-discrimination, side of this discussion at a federal level the Disability Discrimination Act, Building Code of Australia and Australian Standards were not automatically compatible. The Building Code and Australian Standards also lacked legal status under the Disability Discrimination Act so building owners who met the Building Code and Australian Standards on access could still be the subject of a successful complaint under the Disability Discrimination Act. The primary purpose of the Access to Premises Standards, to be enforced from May 2011, is to resolve confusion about the provision of access.

Access to Premises Standards March 2010

Purpose of the Access to Premises Standards

The purpose of the Access to Premises Standards is to provide clarity so that if access is addressed in accordance with the Access to Premises Standards, to the extent covered by the Standards, it will not be unlawful and therefore cannot be the subject of a successful complaint under the Disability Discrimination Act

(DDA). Similarly there is alignment with the Building Code of Australia (BCA) so that if a building complies with the BCA (2009) it will also comply with the Access to Premises Standards. Finally Australian Standards provide technical detail to support 'Deemed-to-Satisfy' provisions of the Access to Premises Standards.

If an access issue, including access to premises, is not covered by the Access to Premises Standards it is still covered by the general provisions of the DDA.

The Attorney General's website contains the full text of the legislation, frequently asked questions, explanatory statement, press releases and additional support material.

Application of the Access to Premises Standards

The Access to Premises Standards will apply to new public buildings and parts of existing buildings undergoing renovation or upgrade including change of use, **that require building approval**, from 1 May 2011.

The Access to Premises Standards provide for greater access than existing standards including: improvements in signage, 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 Access to Premises Standards include lifts, stairs, ramps, toilets, footpaths and accessible paths of travel and circulation within buildings.

The Access to Premises Standards do not cover building fit out, goods and services (websites, ticketing, programs) or staff attitudes towards people with disability.

Two important concessions to note where new work is undertaken are:

- Small buildings of three storeys or less, where the upper storeys are each less than 200 metres squared, will not be require to provide ramps and lifts.
- Lessees are only obliged to comply with the Access to Premises Standards for the portion of the building they lease.

The Access to Premises Standards, as with the DDA, also make provision for unjustifiable hardship.

Heritage value and unjustifiable hardship

The Access to Premises Standards consider the intersection of heritage and access with 'heritage significance' listed as one of the considerations in determining unjustifiable hardship. The factors to be taken into account when determining unjustifiable hardship under s4.1 include:

- (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;

During the consultation phase around the Access to Premises Standards in 2009 a government committee produced the Access All Areas report noting that heritage is not defined and requires clarification ideally to ensure consistency with State and Territory heritage legislation. While it hasn't yet happened a possible solution is to define 'heritage significance' as recognised by listing on the various National, State, Territory and Local heritage lists in addition to heritage 'classified' buildings recognised by the National Trust and Professional Institutions.

The Access All Areas report also proposed deleted the words 'or merely incidental' from s4.1(l) as they add little meaning. The report authors, the House Standing Committee of Legal and Constitutional Affairs, discuss essential (building fabric) and incidental (someone lived there) heritage features though clarifying this point has also been overlooked in the launch of the Access to Premises Standards.

As a result of the Access to Premises Standards there is a concern, from the Disability sector, that heritage is now more likely to be perceived as a defence of unjustifiable hardship and some public awareness may be necessary to clarify that unjustifiable hardship can only be determined by a court.

Another challenge in ensuring clarity on access to heritage buildings in the s4.1(m) good faith consideration where access experts have been consulted. There are not many people skilled in both access and heritage able to provide useful advice in this area. Consideration could be given to sector training and extending the role of existing bodies like the NSW Fire Access and Services Advisory Panel who have considerable experience in providing advice on fire access and heritage issues.

Summary of Issues remaining

The draft 'Removing The Obstacles' report separates issues into two sections with the first identifying generic limitations within Australia's anti-discrimination and heritage protection frameworks (i.e. a need for harmonisation) and the second specific issues identified where the anti-discrimination and heritage protection frameworks have gaps or are in conflict.

There are jurisdiction challenges when interpreting anti-discrimination and heritage as Federal, State / Territory and Local Government legislation and regulations would benefit from harmonisation as they are not always the same. Where there is conflict the accepted principle is that Federal legislation over rides the other spheres though it isn't always that straightforward as there are both gaps and overlaps between the jurisdictions. In cases where both State / Territory and Commonwealth laws apply, a person wishing to complain about

discrimination will need to elect a jurisdiction. Then within a jurisdiction the question of how anti-discrimination and heritage legislation and regulations interact has rarely been considered.

The report is primarily concerned with Commonwealth legislation and impacts. The Disability Discrimination Act 1992 (Cth) covers discrimination that takes place in a particular area of public life including employment, provision of goods and services, education and in the administration of Commonwealth programs.

The complaint process under the Disability Discrimination Act requires a person who is discriminated against to lodge a complaint to have their rights upheld. The majority of complaints then go through a conciliation process and a successful outcome isn't necessarily made public and doesn't form a legal precedent. The alternative is for a person with a disability to fund a Federal court action. Compared to the USA and UK, Australia does not place the same level of positive onus on organisations to make themselves accessible. The combined result is an absence of binding decisions by the Australian Human Rights Commission and Courts about access generally.

While the last two decades have seen increased awareness of access to premises and the drafting of guidelines an arguably equally significant gap exists in developing guidelines for the goods and services provision of the Disability Discrimination Act. The goods and services provision is particularly relevant to the cultural and heritage sectors as it covers the ticketing of events, exhibition design and captioning of exhibits, performances and interpretive material. In limiting the manageability of this project the research partners have considered goods and services to be beyond the scope of this initial report.

In turning to look at specific issues between heritage and access where there are either gaps or conflicts we acknowledge that the vast majority of heritage building owners whose premises are open to the public have considered access issues. In particular the Australian Council of National Trusts and Australian Heritage Council 1999 publication 'Improving Access to Heritage Buildings' was a landmark moment. It has taken another 10 years, and a change of government, for progress to be made on the development of Access to Premises Standards. The Access to Premises Standards launched in March 2010 are the conclusion of a discussion begun with the release of an earlier version of access to premises standards in 2000 with little follow up from the Government at that time.

Specific access and heritage issues identified through this research include:

1) Complexity of heritage and access

The respective complexity of heritage and access considerations do not lend themselves to a prescriptive approach. Instead there may be greater value in developing principles and guidance that allow flexibility and can be applied case by case to balancing heritage and access issues. Here the project partners are looking again at the project aims and considering whether there is a need for legislative reform or it would be more useful to develop best-practice guidelines.

2) Access and existing heritage buildings

The Access to Premises Standards apply to new buildings and buildings undergoing significant renovations. Changes to the use of a building may not see improvements in access unless the change triggers a development application in

which case the Access to Premises Standards will apply. This is a potential limitation on access to heritage buildings that may undergo period maintenance and restoration though are unlikely to be significantly renovated although the principles of adaptive re-use are well established and there is recognition in the heritage sector that the future of older buildings depends upon their continued use.

3) Heritage and unjustifiable hardship

Within the heritage sector there is commonly discussion about the costs of heritage listing associated with maintenance, restoration and potential alteration. The Disability Discrimination Act allows for the defence of 'unjustifiable hardship', which includes cost, when considering the reasonableness of access adjustments. The established legal understanding is that access and heritage considerations can co-exist and heritage status does not automatically lead to an unjustifiable hardship defence. However the Access to Premises Standards introduce heritage significance as a consideration in determining unjustifiable hardship. While noting that heritage required clarification a June 2009 Parliamentary Inquiry report 'Access All Areas' supported its inclusion. There is still a need to clarify the meaning of 'heritage significance' so ensure the Access to Premises standards can be implemented with confidence.

4) Sector skills in access provision and monitoring progress

Access knowledge and auditing is a niche professional skill. To then find access experts who are also skilled in heritage issues may be as difficult as finding heritage architects skilled in interpreting and applying access standards. A particular challenge for the application of the Access to Premises Standards will be the development and maintenance of a skilled pool of people able to assess, devise solutions and monitor progress with the provision of access to heritage buildings.

3) What happens next: Conclusion

The outcome of stakeholder discussions in May 2010 will be collaboration on a final 'white paper' with recommendations for action that may include legislative reform and the development of guidelines for access and heritage buildings in time for the 1 May 2011 commencement of the Access to Premises Standards.

We want to ensure the Access to Premises Standards can be implemented with certainty. The aim of the project is to recognise the skills, expertise and considerable experience that lies within the heritage sector and to include heritage stakeholders in devising equitable solutions.

We expect to publish the final report later in 2010 in the meantime this paper will appear on the conference website and if you want any further information then please contact me or Accessible Arts NSW.

Questions / Comments ?