

Between:	JOHN EDWARD MYTTON BARNES AND GEOFFREY FREDERICK COOK	Applicants
And:	SOUTHERN DOWNS REGIONAL COUNCIL	Respondent
And:	THE CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND RESOURCE MANAGEMENT	Co-Respondent
And:	MCCONAGHY GROUP PTY LTD ACN 108 353 199	Second Co- Respondent

WRITTEN SUBMISSIONS

A Introduction

1. This is an appeal by persons who made submissions, objecting to a development application, against the Council's decision to give a preliminary approval for building works authorising the demolition of part of a building at 84 Fitzroy Street, Warwick.
2. The Respondent was the assessment manager, the Chief Executive of the Department of Environment and Resource Management a concurrence agency¹ and the Second Co-Respondent the applicant for a development approval.

¹ Section 11, Schedule 2 Integrated Planning Regulation 1998

3. The issues in dispute are contained in the "*Amended Grounds of Appeal and Further and Better Particulars*"² and allege that the decision to approve the application is contrary to section 68 of the *Queensland Heritage Act 1992* and conflicts with provisions of the Warwick Shire Planning Scheme³ ("*the WSPS*").

4. The land is:
 - (a) situated at 84 Fitzroy Street, Warwick and described as Lot 1 on RP 5801, Parish of Warwick, County of Merivale;

 - (b) 736m² in area;

 - (c) included within the City Centre designation under the WSPS⁴;

 - (d) improved by a double storey sandstone building constructed in 1874-1875 and built to the property boundary of Fitzroy Street and Haig Avenue with various extensions to the rear of the building; and

 - (e) included in the Warwick Shire Register of Cultural Heritage Places forming part of the WSPS Policy No. 1 Cultural Heritage and is a registered place under the *Queensland Heritage Act 1992*.

5. The development application, the subject of the appeal:
 - (a) sought development approvals for a preliminary approval for building work for the demolition of the buildings at 82 Fitzroy

² Exhibit 1, Volume 2, Tab 2

³ Took effect on 9 December 1999

⁴ Exhibit 5, Report of A Doherty at para 2.0.6

Street and a partial demolition of a rear extension for the building at 84 Fitzroy Street;

- (b) was partially code assessable (82 Fitzroy Street) and partially impact assessable (84 Fitzroy Street);
- (c) attracted six properly made submissions, including the Appellants⁵; and
- (d) was approved by the Respondent, as assessment manager, on 25 November 2009⁶ subject to conditions. The conditions required conservation works to be undertaken to the building at 84 Fitzroy Street before the partial demolition applied for could proceed.

6. To date, the Court has made a number of preliminary determinations in relation to matters relevant to the appeal namely:

- (a) that it be taken that the Respondent's Decision Notice included the conditional approval of the demolition of 82 Fitzroy Street subject to the conditions contained in the concurrence agency response⁷;
- (b) that the development application for building works is "*not the making of an assessable material change of use*"⁸;
- (c) the appeal is properly limited to the partial demolition of 84 Fitzroy Street⁹; and

⁵ Exhibit 1, Volume 1, Tab 1 pp 196-214

⁶ Exhibit 1, Volume 1, Tab 1 pp 256-265

⁷ *Barnes & Anor v Southern Downs Regional Council & Ors* [2010] QPEC 111

⁸ *Barnes & Anor v Southern Downs Regional Council & Ors* [2010] QPEC 131

- (d) the appeal is competent and fell within the scope of section 4.1.28(1)(a) of IPA.

B. The Appellant's Case

7. In addition to the allegation that the development approval is contrary to section 68 of the QHA, it is also alleged that the approval would conflict with a range of provisions of the WSPS, because approval of the development application would:

- (a) not maintain a high standard of amenity, with a cohesive streetscape character in which buildings of heritage significance are protected and new development occurs in a compatible form contrary to section 4.2.1 City Centre Key Policy Statement;¹⁰
- (b) not protect the heritage values of the building at 84 Fitzroy Street contrary to section 4.2.2 City Centre - Policy Intent WSPS;¹¹
- (c) not be compatible with the heritage values of the building at 84 Fitzroy Street contrary to section 4.2.2 Policy Intent WSPS;¹²
- (d) not retain the heritage qualities of the City Centre through the retention of highly significant and significant heritage places in a streetscape context which provides for sympathetic alterations to existing buildings and the incorporation of new development which is compatible with, and respectful to, the existing

⁹ *Barnes & Anor v Southern Downs Regional Council & Ors* [2010] QPEC 131

¹⁰ Paragraph 4(a) Amended Grounds of Appeal

¹¹ Paragraph 4(b) Amended Grounds of Appeal

¹² Paragraph 4(c) Amended Grounds of Appeal

streetscape character contrary to section 4.2.5.2 City Centre Development Code – Purpose;¹³

- (e) allow for the demolition of part of the building when conservation actions are feasible and viable contrary to section 4.2.4.1(c) SSPS Impact Assessment Criteria WSPS;¹⁴
- (f) permit demolition of part of the building at 84 Fitzroy Street which has significance in terms of its historical, architectural streetscape and other special values contrary to section 4.2.4.1(c) Impact Assessment Criteria WSPS;¹⁵
- (g) detract from the heritage significance of the building at 84 Fitzroy Street and would not be compatible with the streetscape contrary to section 4.2.4.1(d) Impact Assessment Criteria WSPS;¹⁶
- (h) does not retain the heritage qualities of the City Centre through the retention of highly significant and significant heritage places in a streetscape context which provides for sympathetic alterations to existing buildings and the incorporation of new development which is compatible with, and respectful to, the existing streetscape character contrary to section 4.2.5.2 Purpose City Centre Development Code;¹⁷
- (i) not ensure that heritage places are retained in a context which is appropriate to an understanding of their cultural value and

¹³ Paragraph 4(d) Amended Grounds of Appeal

¹⁴ Paragraph 4(e) Amended Grounds of Appeal

¹⁵ Paragraph 4(e)(iii) Amended Grounds of Appeal

¹⁶ Paragraph 4(e)(iii) WSPS

¹⁷ Paragraph 4(f) Amended Grounds of Appeal

respectful of their design qualities contrary to section 4.2.5.4(a) Development Control Performance Objective;¹⁸

- (j) does not ensure that heritage places are retained in a context which is appropriate to an understanding of their cultural value and respectful of their design qualities contrary to section 4.2.5.4 Development Controls, City Centre Development Code;¹⁹
- (k) permit demolition of part of the building at 84 Fitzroy Street which has significance in terms of its historical architectural, streetscape and other special value contrary to section 5.3.3.1 Impact Assessment Criteria – Carrying out Building Works;²⁰
- (l) would allow for demolition of part of the building of significance when conservation actions are feasible and viable contrary to section 5.3.3.1 Impact Assessment Criteria – Carrying out Building Work WSPS;²¹
- (m) would allow the demolition of a portion of the building which detracts from the heritage significance of the building and will be compatible with the streetscape (section 5.3.3.1 Impact Assessment Criteria – Carrying out Building Work).²²

C. The Evidence

8. The Court heard evidence from expert witnesses in three disciplines.

¹⁸ Paragraph 4(f) Amended Grounds of Appeal

¹⁹ Paragraph 4(g) Amended Grounds of Appeal

²⁰ Paragraph 4(h)(i) Amended Grounds of Appeal

²¹ Paragraph 4(h)(ii) Amended Grounds of Appeal

²² Section 4(h)(iii) Amended Grounds of Appeal

9. Three town planners gave evidence: Peter Gill on behalf of the Developer, Annette Doherty on behalf of the Respondent Council and Associate Professor Searle on behalf of the Appellant. All witnesses participated in the preparation of a joint witness statement²³ but only Mr Gill²⁴ and Ms Doherty²⁵ prepared trial reports.
10. It is respectfully submitted that the evidence of Ms Doherty would be preferred over the evidence of Associate Professor Searle for a number of reasons.
11. **First**, her evidence was thoughtful and careful and she turned her mind, for example, to the citation²⁶ which the Council considered before including 84 Fitzroy Street in the register of places pursuant to PSP1²⁷.
12. **Secondly**, she dealt with and discussed, without prompting, what appeared to be the important controlling provisions contained within sections 4.2.4.1(d) and 5.3.3.1(d) of WSPS relating to external building work²⁸.
13. **Thirdly**, she had a balanced view about the existing streetscape of Haig Avenue, given its form and function²⁹.
14. **Fourthly**, she conducted a site inspection, and she was very familiar with the site and its environs and the relevant streetscapes.
15. **Fifthly**, her evidence was not challenged to a significant degree.

²³ Exhibit 1, Volume 3, Tab II

²⁴ Exhibit 2

²⁵ Exhibit 5

²⁶ Exhibit 13

²⁷ Exhibit 5 paras 5.4.10 – 5.4.11

²⁸ Exhibit 5 para 5.4.2

²⁹ Exhibit 5 para 5.2.6

16. Regrettably, the evidence of Associate Professor Searle was unsatisfactory in several material and important respects:

- (a) he did not carry out a site inspection³⁰ in circumstances where the issues in dispute concerned matters of streetscape, and architectural significance. No reason was provided as to why a site inspection was not undertaken and this seems to have been a personal decision on behalf of the witness;
- (b) he could not recall having perused the development application³¹ or important reports³² submitted which were relevant to its assessment in circumstances where those reports had been given to him by his legal team³³;
- (c) he had not seen a copy of the rules of the Court³⁴ about the duties and obligations of expert witnesses when those things had been drawn to his attention³⁵;
- (d) he applied a wrong test. He thought that "*significance*" meant adds to the quality in a meaningful way³⁶ in circumstances where ultimately the Court would be persuaded that it means "*important*";
- (e) his evidence was vague. For example, he could not recall providing a draft copy of the joint witness statement to his

³⁰ T 3-103 / 3-4

³¹ T 3-73 / 1-2

³² T 3-75 / 7-12

³³ Affidavit of Janet Cook sworn 3 August 2011

³⁴ Exhibit 20

³⁵ T 3-72 / 45-50

³⁶ T 3-87 / 30-40

instructing solicitors³⁷ in circumstances where he had clearly done so;

- (f) his evidence lacked balance. For example, he maintained that the partial demolition of 84 Fitzroy Street would have a significant adverse impact on the streetscape of Fitzroy Street in circumstances where there is a very limited view of that portion of the building from Fitzroy Street³⁸;
 - (g) he was reluctant to accept that there would be different approaches to streetscape depending on the street or land having considered and had to be pushed to agree with the position;
 - (h) he applied tests which did not emerge from the planning scheme³⁹;
 - (i) he refused to consider the provisions of the planning scheme in context and seemed determined to give them weight only depending upon the extent to which he thought they supported his views;
 - (j) he relied upon his experience rather than careful consideration to assist the Court in formulating the view about relevant questions;
- and

³⁷ T 3-75 / 30-40

³⁸ T 3-86-87 / 25-10

³⁹ T 3-95-97 / 50-55

(k) he dismissed the suggestion that the building works may be external building works when that is clearly part of the Applicant's case.

17. The Court heard from three expert witnesses about cultural heritage values and significance.

18. It is respectfully submitted that the evidence of Mr Davies and Mr Ross-Watt should be preferred over Mr Scott. Mr Scott wanted to establish the buildings cultural heritage significance from a first principle analysis, based on subjective views and failed to have regard to the objective criteria establishing the heritage significance of the land for the purposes of WSPS and in the *Queensland Heritage Act*.

19. Finally, the Court heard from two engineers, about the structural integrity of the portion of the building to be demolished and the balance of the building. Notwithstanding the difference of opinion between them, the following evidence is important in the current context:

(a) the structural integrity of the building to be retained is, in material respects, in jeopardy and work needs to be undertaken without delay to ensure the buildings fabric is not compromised; and

(b) that the portion of the building proposed to be demolished is structurally sound.

D. WSPS – Construction & Conflict

20. The Court has previously given clear statements about the proper interpretation of planning schemes. In *Westfield Management Limited v Pine Rivers Shire Council & Anor*⁴⁰ Britton SC DCJ said that with respect to the construction of planning schemes:

"[18] I accept that the following principles apply to the construction of planning schemes:

- (a) they should be construed broadly rather than pedantically or narrowly and with a sensible, practical approach;*
- (b) they should be constructed as a whole;*
- (c) they should be constructed in a way which best achieves the apparent purpose and objectives;*
- (d) in the light of the prescription against prohibiting development contained in IPA (s 6.1.2)(3);*
- (e) Statements of Intent or Aims or Objectives are intended to provide guidance for the task of balancing the relevant facts, circumstances and competing interests in order to decide whether a particular use should be rejected as inappropriate;*

⁴⁰ (2004) QPELR 337

- (f) *a Strategic Plan sets out broad desired objectives and not every objective needs to be met before a proposal can be approved;*
- (g) *a Strategic Plan should be read broadly and not pedantically;*
- (h) *although planning documents have the force of law they are not drawn with the precision of an Act of Parliament;*
- (i) *a conflict alone may not have the effect of ruling out a particular proposal;*
- (j) *implementation objectives must be read sensibly and in context. They are but a function of the principle objective; The purpose of the objective is better understood by reading all of the implementation objectives and understanding the strategy that is inherent."*

(underlining added)

21. Given the transitional provisions of the *Sustainable Planning Act* 2009⁴¹, this appeal must be heard and determined as if the *repealed Integrated Planning Act* 1997 ("IPA") had not been repealed.

⁴¹ 820(6)

22. Under the IPA, the assessment manager's decision and the Court's decision must not:
- (a) compromise the achievement of the desired environmental outcomes for the planning scheme area⁴²; or
 - (b) conflict with the planning scheme, unless there are sufficient grounds to justify the decision despite the conflict⁴³.
23. Any conflict must be able to be plainly identified and there must be some real variance or disagreement with the provisions of the planning scheme⁴⁴.
24. If a conflict does exist, it is necessary then to consider whether that or those negatives are sufficiently outweighed by other relevant and objective grounds of justification. In *Weightman v Gold Coast City Council*⁴⁵, Atkinson J said:

"In order to determine whether or not there are sufficient planning grounds to justify approving the application despite the conflict, as required by section 4.4(5)(A) of the P&E Act, the decision maker should:

- (1) examine the nature and extent of the conflict;*
- (2) determine whether there are planning grounds which are relevant to the part of the application which is in conflict*

⁴² 3.5.14(2)(a) IPA

⁴³ 3.5.14(2)(b) IPA

⁴⁴ *Woolworths Ltd v Maryborough City Council (No. 1)* (2006) 1Qd R273

⁴⁵ (2003) 2 Qd R 441 at para [36]

with the planning scheme and the conflict can be justified on those planning grounds;

(3) determine whether the planning grounds in favour of the application as a whole are, on balance, sufficient to justify approving the application notwithstanding the conflict."

25. In a later decision, Fryberg J⁴⁶ in considering the provisions of relevance here, expressed the view that it may not be necessary for the decision maker to formally identify each area of conflict and that "...*the purely mechanical application of the Weightman dictum should be avoided*".
26. There has been some divergence of views with respect to the precise construction of section 3.5.14(2)(a) of the IPA. There is authority to suggest that to compromise a DEO, there would have to be an "*obvious and significant cutting across of the DEO in such a manner that its achievement on a shire wide basis had plainly been compromised*"⁴⁷. However, in *Webster v Caboolture Shire Council*⁴⁸, the Court queried the construction given in the earlier decisions. His Honour Judge Brabazon QC DCJ rejected interpretations of the statutory words which imported the necessity that the achievement of the DEO on a shire wide or city wide basis is required. The Webster approach has received approval of the Court of Appeal (albeit obiter) in *ALDI Stores v Redland City Council*⁴⁹.

E. WSPS – Hierarchy & Proper Construction

⁴⁶ *Woolworths Limited v Maryborough City Council (No. 2) Supra*

⁴⁷ *Koerner v Maroochy Shire Council* (2004) QPELR 211; *Handley v Brisbane City Council* (2005) QPELR 80

⁴⁸ (2008) QPEC [82]

⁴⁹ (2009) QCA 346 at para [19]

27. The WSPS requires development which is subject to impact assessment to be assessed against "all" the provisions of the WSPS and any relevant planning scheme policies, including relevant codes⁵⁰.
28. Clearly, the scheme provisions go a little too far in that it should be taken to mean "*all relevant*" provisions of the WSPS.
29. Consistent with all schemes of its type, it contains a hierarchy⁵¹.
30. In addition, the planning scheme says the following⁵²:

*"In accordance with the Act, this planning scheme sets out **desired environmental outcomes** for the Shire. These represent the policy basis that underlines all other provisions for the planning scheme and are contained in section 2. The other provisions within the planning scheme form the **measures** intended to support the achievement of the desired environmental outcomes.*

*To operationalise the integrated development approval system (IDAS) established by the Act, the planning scheme identifies the forms of development that are **exempt, self-assessable** or require **code assessment** or **impact assessment** in sections 4 and 5.*

Assessment criteria which will be used in determining applications for impact assessment are contained in sections 3, 4 and 5. Particular codes which will be applicable to applications

⁵⁰ Section 1.4.1(iii) Assessable Development WSPS

⁵¹ WSPS p 1-5

⁵² Section 1.2 WSPS

for both code and impact assessment are contained in sections 4, 5, 6 and 7."

31. Within sections 4 and 5 there are clearly provisions like Key Policy Statements which provide a statement of intent or objectives which are then expanded upon and particularised by other provisions such as the impact assessment criteria and the relevant codes.
32. Unsurprisingly, it will be more difficult to show that there is a conflict with a Key Policy Statement which expresses broad views which might affect an area like the City Centre then with provisions which are more specific, such as impact assessment criteria contained in relevant parts of the scheme.

F. Assessment against WSPS

33. It is respectfully submitted that as a matter of impression or as a matter of fact there is no conflict with the provisions of the WSPS either considered in the context of a hierarchy or otherwise.
34. That is because the development, if approved, will do more than merely authorise the demolition of part of the building at 84 Fitzroy Street. In fact, the development approval will, in addition to approving the partial demolition, also deliver the conservation of the balance of the building.
35. When the development application is viewed in this way the criticisms, that the approval of the application would *"not maintain a high standard of amenity, with a cohesive streetscape character on which buildings of*

heritage significance are protected", new development occurs in a compatible form⁵³ are simply not made out.

36. The only evidence about a failure to maintain a high standard of amenity is contained in Associate Professor Searle's contribution in the joint witness statement. It is not supported by reasoning and whilst amenity is a concept of broad application⁵⁴, the approval of the application if acted upon will lead to a higher standard of amenity because it necessitates the conservation of those parts of the building which have been identified as having the highest heritage significance.
37. Suggestions that the approval of the application would impact on the cohesive streetscape character in which buildings of heritage significance are protected are also not made out. This laneway is far from cohesive in its streetscape and the removal of an element will not make it less so. In addition, the Court should not lose sight in this context that the heritage values of the buildings at 84 Fitzroy Street will be protected and enhanced by the conservation of the balance of the building.
38. Assuming it has application, then the provisions of the WSPS which requires that when assessing the demolition or removal of a building, consideration should be given to whether the building is of no significance in terms of its historical, architectural streetscape and other special value are the most relevant test emerging from the myriad of provisions raised by the Appellants.

⁵³ See paragraph 7(a) of the Submission

⁵⁴ See *Broad v BCC*

39. It is not suggested that the part of the building to be demolished has architectural importance of itself, rather its importance emerges from its association with the remainder of the building.

40. The evidence from the Appellants' seems to suggest that the historical significance of the rear service wing is by association with the balance of the building and that it, of itself, has no particular significance. This boots and braces approach does not result in a conflict.

41. In terms of the streetscape, it is clear that the partial demolition of the building will change the streetscape. That of itself is not the issue. The question is whether, relevantly, removal of part of the building is of significance in terms of the streetscape of both Fitzroy Street and Haig Avenue. It is respectfully submitted that the impact upon the streetscape of Fitzroy Street is de minimis. As for Haig Avenue, the impact is clearly of greater measure. The current building does contribute in some way to the streetscape of Haig Avenue. Its removal will change that. However, its removal is not important in terms of the streetscape value of Haig Avenue because that streetscape is currently mixed and not cohesive. To the extent that the Court might be concerned that the partial demolition might leave a gap which by itself might provide views to unsightly back of house elements of land and adjoining lands, that could be rectified by the imposition of a condition which required some semi-mature vegetation to be put in place, which by itself may well seek to improve the streetscape of that portion of Haig Avenue.

42. At the end of the day, it is respectfully submitted that the provisions which have clearest application relate to the circumstances in which external building works can be undertaken in relation to a building listed in PSP1 (see both section 5.3.3.1(h) and section 4.2.4.1(d) WSPS).

Those provisions require:

"whether a conservation study demonstrates that the new work will not detract from the heritage significance of the building and will be compatible with the streetscape."

43. The use of the words *"will not detract from the heritage significance of the building"* are important, because none of the evidence here demonstrates that the removal of the rear section of this building will *"detract"* from its heritage significance of what remains in a meaningful way.

44. In addition, either by reference to Exhibit 13⁵⁵ or the Citation for Entry of Plumb's Chambers in the Queensland Heritage Register, the part of the building to be demolished is not of significance and will not, as a consequence, detract from the significance of the remainder of the building.

45. As for the requirement for compatibility with the streetscape, that is clearly made out because the current streetscape of Haig Avenue is not cohesive and the removal of part of the building will not change that or further detract from the existing streetscape.

⁵⁵ The Cultural Heritage Study, Volume 3, Inventory of Places, Part1, Survey 55

G. External Building Works & the Code Assessment Point

46. It is respectfully submitted that the proposed building works, properly construed are "*external building works*" rather than proposal to "*demolish or remove a building listed*"⁵⁶ in PSP1.
47. The starting point for such an analysis is the proposition that not all building works to a building listed in PSP1 are assessable against the WSPS. Clearly, works that might otherwise be building works like repair or maintenance work are not assessable⁵⁷.
48. Absent a material change of use, like here, the only building works which are assessable are those which involve "*external building work*" or "*removal, demolition*"⁵⁸.
49. The definition of "*External Building Work*" says:
- "Means any building work related to the exterior portion of a building, other than development that is made exempt or self-assessable under the standard building regulations. The term does not include repair or maintenance work."*⁵⁹
50. There is no definition of "*demolition*" or "*removal*" in the WSPS. The definition of building works includes, relevantly, demolition⁶⁰.
- 10
51. The scheme came into effect on ~~9~~ December 1999. The definition of external building works has not been updated since the scheme took

⁵⁶ Section 5.3.3.1(a) WSPS

⁵⁷ See definition of "*External Building Work*" WSPS p1-6

⁵⁸ Section 5.3.2 – Table of Development – Building Work

⁵⁹ Section 1.5.1 Explanatory Definitions WSPS

⁶⁰ See definition of "*Building Work*", Section 1.5.1 WSPS

effect. At the date the scheme came into effect and was adopted, reprint no. 2.A of the *Standard Building Regulation 1993* ("SBR") was in effect.

52. Pursuant to section 4 of the SBR, the development set out in schedule 5 was designated to be self-assessable and exempt development for the purposes of the repealed IPA, but it does not apply to buildings included in a register under the QHA.

53. The following factors point to the construction that the works proposed are external building works:

- (a) taking the provisions of section 5.3.3.1(a) as an example, when the provision speaks of "*a proposal to demolish or remove a building listed in*" PSP1, it speaks of the whole of the building being demolished or removed and this assessment criteria also speaks of "*the building*" as a single unit;
- (b) interpretations which prefer the application of section 5.3.3.1(a) require the inclusion of the word "*part*" at various junctures in the provision, like:

"In assessing an application for a proposal to demolish or remove a building or part of a building listed in Planning Scheme Policy No. 1, consideration will be given to whether a conservation study has demonstrated that:

- *the building or part of the building is of no significance in terms of its historical, architectural streetscape or other special value or;*
- *whether the building or part of the building is of significance, the conservation actions are not feasible or viable."*

Whereas, no such violence needs to be done to the definition of external building works.

(c) The provisions which control external building works focus on whether "*the new work will not detract from the heritage significance of the building and will be compatible with the streetscape*", which are provisions which assume~~s~~ that part of the building remain, as here.

(d) The provisions which relate to demolition or removal focus on whether the buildings' demolition or removal is of no significance in terms of its historical, architectural, streetscape or other special value, rather than significance of what remains.

54. In the event the Court concluded that the proposed building works were "*External Building Works*", then there is a possibility that the development may be code assessable in any event⁶¹.

55. That question turns upon whether the partial demolition "*will have a deleterious effect on the design integrity of the building*".

⁶¹ Section 5.3.2 Table of Development – Building Works WSPS

56. There is evidence that it will not⁶². Ultimately, that question focuses on what the design integrity of the building is and how it is effected by the partial demolition. Here it is submitted that the partial demolition will not have a deleterious effect on the design integrity because:

(a) the value of the building and its design emerges from the parts of it which are constructed of sandstone;

(b) absent the rear service wing, what remains will still be whole in terms of its form and character.

57. It is open on the evidence to conclude the development was code assessable and that the Court has no jurisdiction to decide the appeal.

H. Section 68 QHA

58. The provisions of the QHA require the refusal of this application if the partial demolition would destroy or substantially reduce the cultural heritage significance of a State heritage place.

59. No party is suggesting that the partial demolition will destroy the cultural heritage significance of 84 Fitzroy Street.

60. The question is whether the partial demolition will "*substantially reduce*" the cultural heritage significance of 84 Fitzroy Street.

61. The expression "*substantially reduce*" has not been considered by the Court in the context of section 68 of the QHA.

⁶² T 2-61 / 15/25

62. In accordance with accepted principles of statutory interpretation, those terms adopt their usual meaning⁶³.

63. The word "*substantially*" is not separately defined in the Macquarie Dictionary but the word "*substantial*", an adjective, means as follows:

- "(1) of a corporeal or material nature real or actual;*
- (2) of ample or considerable amount, quantity, size etc.; a substantial sum of money;*
- 3) of solid character or quality, firm, stout or strong;*
- (4) being such with respect to essentials: 2 stories in substantial agreement;*
- (5) wealth⁶⁴ or influential; one of the substantial men of the town;*
- (6) of real worth or value; substantial reasons;*
- (7) pertaining to the substance, matter or material of a thing;*
- (8) of or pertaining to the essence of a thing, essential material or important;*
- (9) being a substance; having independent existence."*

64. The Court has said the following things about the expression "*substantial*" in a range of contexts:

- (a) it means real or of substance; more than trivial or minimal⁶⁵;
- (b) not insubstantial or nominal⁶⁶;

⁶³ Section 14B(1)(c) of the *Acts Interpretation Act 1954* (Qld)

⁶⁴ See Explanatory Note tabled in Parliament with Bill

⁶⁵ *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* [1979] FCA 85 discussed the meaning of "*substantial*" loss or damage as it appears in Section 45D of the *Trade Practices Act 1974* (Cth)

(c) considerable, large or weighty⁶⁷;

(d) between total and trivial⁶⁸.

65. The expression has been said to be imprecise and ambiguous and highly dependant on context⁶⁹.

66. The citation for the building does not identify the rear service wing at all or even by implication. The citation is important because it establishes the criteria for entry of a place in the Queensland Heritage Register and it has legal effect.

67. It is perfectly clear that when judged against the elements of the citation the removal of the rear service wing will not substantially reduce the cultural heritage significance. The evidence of the Appellants does not change that position. The exercise undertaken by Mr Scott in paragraphs 4.01 to 4.06 is not convincing and fails to consider the impact on what remains.

I. Sufficient Grounds

68. These submissions have proceeded on the basis that there is no conflict with the WSPS but if the Court takes a contrary view, there are sufficient grounds to justify the approval despite the conflict, if one

⁶⁶ *Re Cool and Sons Pty Ltd Trading as Wagga Windscreen Service v O'Brien Glass Industries Limited* [1981] FCA 95 considered the meaning of "substantially" lessening competition as per Section 47 of the *Trade Practices Act 1974* (Cth)

⁶⁷ *Queensland Co-Operating Milling Association Ltd; Re Defiance Holdings Ltd* (1976) 25 FLR 169 considered the meaning of "substantial" within the phrase "substantial benefit to the public" in Section 90 of the *Trade Practices Act 1974* (Cth)

⁶⁸ *R v Lloyd* (1967) 1 QB 175 discussed the meaning of "substantial" within the context of substantial impairment of mental faculties

⁶⁹ *Re Radio 2ue Sydney Pty Limited v Stereo FM Pty Limited* (1982) and *2 Day-FM Limited* [1982] FCA 206 considered the meaning of term "substantially" as it appears in Sections 45 and 45A of the *Trade Practices Act 1974* (Cth)

exists. Those grounds emerge from the conservation of the sandstone building at 84 Fitzroy Street and the consequential improvements in streetscape and amenity for the wider community.

J. Conclusions

69. It is respectfully submitted:

- (a) There is no conflict with the planning scheme or in the event of a possible conflict it is of such a small character as not to demand a refusal. The Court would be satisfied that the objectives and implementation criteria and measures contained in the WSPS are met and respected;
- (b) The partial demolition will not substantially reduce the cultural heritage significance of 84 Fitzroy Street;
- (c) The development should be approved and the appeal dismissed.

MJ Connor
Solicitor for the Respondent