

SUBMISSION TO PRODUCTIVITY COMMISSION

**CONSERVATION OF AUSTRALIA'S HISTORIC
HERITAGE PLACES DRAFT REPORT**

FEBRUARY 2006

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Executive Summary

The Professional Historians Association NSW (PHA) regards the inquiry of the Productivity Commission into the Conservation of Australia's Historic Heritage Places as immensely significant for the future of heritage conservation in Australia. The Terms of Reference recognize that conservation of heritage places is under pressure; that there is a three-tier system in place with some duplication of effort; that research into heritage management, including economic factors, is lacking in Australia; and there are impediments and incentives which need investigation.

Given the above the PHA is disappointed that the Productivity Commission has largely focused on such a narrow line of inquiry, namely, the rights of private property owners, the abolition of statutory protection and the introduction of conservation agreements. It has done this in the absence of reliable evidence that a widespread problem exists which would be solved by these measures.

The Draft Report shows a lack of understanding of the principles, history and practice of heritage assessment. It does not refer to the latest scholarship in cultural economics, a field which the Commission relies upon in making its conclusions. It makes sweeping negative statements about heritage assessment without pointing to supporting evidence. While the Draft Report does identify the lack of funding for heritage, it does not investigate new or alternative sources of funding for heritage so as to compensate or provide incentives to private owners. Nor does it investigate the costs of its own recommended conservation agreements. In addition, the recommendations appear to be based on a view that heritage "values" are transferable between properties; they do not recognize a key principle of the Burra Charter, that the intrinsic cultural significance of a place is unique to that place.

The measures proposed by the Commission require much more detailed research and consideration. At present, the PHA submits that the proposed conservation agreements would have a negative impact upon the conservation of built heritage because:

- they remove any incentive for heritage authorities to identify, research or list heritage items;
- the likelihood that governments could or would fully compensate an owner for the loss of development opportunity is remote;
- owners who might anyway be inclined to protect their property in return for some financial incentive, will be poorly compensated in contrast to an owner seeking full commercial value for a property they see only as a commodity. Thus those who sacrifice the most and provide the greatest benefit for the community will receive the least reward;
- if a property is not listed because there is no agreement in place, there will be no requirement for the relevant heritage agency to be notified before any development, thus creating a greater risk of the secret destruction of heritage items; and

- existing heritage lists which inform us about the state of our heritage, help to rank heritage significance, and act as a guides for planning and future research, will instead become mere ledgers of those properties it was economically possible to preserve, and their market value.

The PHA however would support the use of conservation agreements as an adjunct to existing regulation and an incentive for heritage preservation, and considers that those owners who are willing to forgo additional income in order to conserve their property, or are willing to act as custodians for the future, deserve financial recognition of their efforts.

This is a Draft Report, and the Commission's process is not yet complete. The heritage system in Australia is a complex one, as it is integrated with the planning system, and States, Territories and local councils vary in their approaches and attitudes to heritage. It is not surprising that the Draft Report has gaps or mistakes; it would be surprising if it did not.

As the Commission notes in its first Finding, there is little statistical information available on how the system works. Given this context, it is surely premature to recommend a policy that will abandon the practice and principles developed over many years both here and overseas. The proposed approach will have serious ramifications for our built environment, our understanding of our history and our sense of identity both now and in the future. Once demolished, built heritage cannot be recovered.

It is submitted that there are alternative solutions that would benefit property owners as well as the public. Some of these have been drawn to the Commission's attention in other submissions, and the Commission should use its expertise to investigate these.

At present, the PHA can only support the following draft recommendations:

“3.1 All levels of government should put in place measures for collecting, maintaining and disseminating relevant data series on the conservation of Australia's historic heritage places.

7.4 The Australian Government should implement reporting systems that require government agencies with responsibility for historic heritage places to document and publicly report on the heritage related costs associated with their conservation.

7.5 State, Territory and local governments should:

- produce adequate conservation management plans for all government-owned statutorily listed properties; and
- implement reporting systems that require government agencies with responsibility for historic heritage places to document and publicly report on the heritage related costs associated with their conservation.”

The remainder of the draft recommendations are not supported.

1. The Professional Historians Association (NSW)

The Professional Historians Association (NSW) (PHA) represents practising professional historians in New South Wales and the Australian Capital Territory. The PHA was formed in 1985 as a professional association for practising qualified historians. It is a member of the national body — Australian Council of Professional Historians Associations Inc. (ACPHA).

The objectives of the PHA include:

- To set and maintain standards of professional practice
- To ensure observance of the Australian Council of Professional Historians' Associations Inc. Code of Ethics and Professional Standards for Professional Historians in Australia
- To pursue common objectives and maintain links with other Australian professional historians' associations through membership of the Australian Council of Professional Historians' Associations Inc.
- To maintain links with other similar organisations
- To promote the concept of professional history and the status of professional historians in the community

Membership is based on a National Accreditation Standard prepared by the Australian Council of Professional Historians Associations.

The PHA maintains the Register of Historic Places and Objects, an inventory of heritage places and objects in NSW and ACT identified by PHA members. It aims to illustrate aspects of historical significance in heritage and to increase understanding of historical significance. The PHA is represented on the History Advisory Panel to the NSW Heritage Council established under the Heritage Act 1977; the Community Advisory Panel to State Records NSW; the History Council of NSW; and the National Archives.

PHA professional members are frequently commissioned to provide historical input into heritage studies, conservation plans, heritage impact statements, commissioned histories, and other heritage projects. They work in government agencies, museums, local councils as well as independent consultants. As such they have a wide knowledge and experience of the heritage industry and heritage regulation in NSW and the ACT and the importance of heritage conservation to ensure understanding and knowledge of our historical past.

2. Approach and general comments

The Terms of Reference to the Productivity Commission reproduced in the Draft Report note that :

“The conservation of our built historic heritage is important. Places of historic significance reflect the diversity of our communities. They provide a sense of identity and a connection to our past and our nation. There is a need for research to underpin how best to manage the conservation and use of our historic heritage places.” (p.v)

The PHA endorses this statement and submits that the findings of the Productivity Commission should start from the point that there is a need to conserve our significant heritage; that heritage has numerous public as well as private benefits, and that our conserved heritage should be diverse and reflect all aspects of our society. These are values which have come to be accepted over time by Australian society.

It is the PHA’s view that the Draft Report does not do this. The report queries the benefits flowing from conservation of our heritage and starts from the position that society must do even more to demonstrate that it values heritage. The benefits of heritage are treated as potential and contingent rather than existing and actual.¹ This is evident throughout the Report and particularly in section 6.4 “Measuring the benefits of historic heritage conservation”. Such an approach ignores the long history of legislation and community activity in this country which demonstrates that the public values its heritage and which has led to the system of heritage protection in place today. In this part of its submission the PHA attempts to set out some of this history while focusing on the current issues that face heritage conservation and commenting on the Productivity Commission’s sources and approach.

This submission has been authored by a number of members of the PHA, thus drawing upon different members’ expertise and knowledge. Their contributions have been edited before approval by the PHA Executive.

2.1 *Private interests vs the community*

The Commission states that its overriding concern is the wellbeing of the community as a whole, rather than any particular group or industry (p. 5). It states that the Commission has sought to build on the many strengths of the existing arrangements and that it “has not been necessary to start afresh”. Contrary to these statements, however, is the overarching recommendation of the Commission that “Privately owned properties should be included on a national, State or Territory or local government Statutory heritage list

¹ For example: “...there is also the potential for historic heritage places to generate cultural benefits” (p. 9); “The conservation of Australia’s historic heritage places can generate a number of benefits.” (p. 10); the heading “Potential benefits of heritage conservation” (Box 2.2).

only after a negotiated conservation agreement has been entered into and should remain listed only while an agreement is in force.” (Key recommendation – draft recommendation 8.1).

It is submitted that this recommendation places select private interests above those of the community (even the nation, in cases of nationally significant heritage items) and does “start afresh” by abandoning the system of heritage significance criteria and listing which has been developed over decades. It does so in the absence of any real evidence that there are widespread negative social or economic impacts caused by the present system.

2.2 Lack of evidence

The report relies heavily on public submissions. These may be submissions from government funded or community bodies which have, to varying degrees, the ability to research and substantiate their submission; or they may be from individuals relating their own experiences, but who do not have the time or resources to place those experiences in the larger context. The Terms of Reference state “there is a need for research to underpin how best to manage the conservation and use of our historic heritage places”. It is disappointing that this Draft Report did not commission such research to assist it in reaching its conclusions, but instead relies so much on anecdotal evidence, on ideas thrown up without any measure of their effectiveness, and of conclusions drawn without evidence. In some cases generalizations which are quite significant are made without reference to any specific evidence. A number of such instances are identified later in this submission, but two examples where the evidence seems to be lacking are listed below.

The Commission does not appear to distinguish between submissions the veracity of which can be checked, and those which are in substance personal complaints or polemics. While anecdotal evidence can indicate avenues for research, it should be treated warily as evidence in its own right. If heritage attributes of property are to be criticized for being “subjective” by the Commission it should also be recalled that private property owners who are unhappy about being unable to reap the full economic potential of their property are also likely to view this matter subjectively.

2.2.1 Views attributed to participants

Under the heading “Unsystematic listing system” (in section 4.7) it is stated that “many” participants observed that the identification and listing process has been “unsystematic, non-selective and did not take into account the cost of conservation”. Further:

“With the cost of conservation placed on owners, it was argued [by participants, it must be assumed is meant] that there was little incentive for States and Territories to be selective and thus, the incentive was to list ‘too much’ — that is all heritage items were eligible for listing, irrespective of the number already conserved or of the relative heritage value of individual places” (p. 69).

No direct references are given for these views attributed to participants. Four submissions are however referred to by name in this section of the Report and quoted — Ivan MacDonald Architects, Tom Perrigo CEO of the WA National Trust, Save Braidwood Inc. and Graham Brooks and Associates. None of the quotations from these submissions however, directly make the statement referred to above.

A check of the submissions on the Commission’s website does not assist. The submission by Ivan MacDonald Architects says nothing about excessive listing. Nor does that of Tom Perrigo of the WA National Trust; in fact his concern about “confusion” and “outcomes” is the rejection of heritage items for listing and takes the view that “as much as possible” should be saved. While Save Braidwood Inc. does make the statement attributed to it, questioning how valuable heritage will be if more is listed, that comment is made in the context of the listing of an entire town.

The submission of Graham Brooks and Associates, however, contrary to the impression one gains from this section of the Draft Report, states that heritage management in Australia “is of a very high standard when compared with the prevailing systems and frameworks in most developed economies” and while comparison undertaken to ascertain rarity or representativeness is said to be insufficient, he does not conclude that this means that unsuitable items have been listed. In fact the submission states “the range of things that people regard as being important components of their heritage is ever growing” which is an argument that listings reflect public perceptions.

There is no evidence to be found in this section or elsewhere in the Draft Report which clearly supports the claimed connection between the allocation of the costs of conservation to owners and the alleged incentive to list too many items which is a key finding of the Report (7.5 and 7.6). This analysis of a small section of the Draft Report leads to a concern about the use of four submissions from three States, to justify criticisms of the entire State and Territory listing system across Australia.

We deal further with the allegations of over-listing later in the submission.

2.2.2 Support for conservation agreements

On page 71 after a review of the Commonwealth, State and Territory heritage systems it is stated “there is little doubt among participants that focusing on ‘conservation by agreement’ would result in more beneficial conservation outcomes”. If it is participants in the Commission’s inquiry that are meant, again there is no evidence of the proportion who agreed, and in what form this question was put to them.

The usefulness of this information must be doubted in any case, since at p. 46 it is stated “no conservation agreements have been entered into” under the Commonwealth Environment Protection and Biodiversity Conservation Act and only 4 places on the National Heritage List are non-government owned. Therefore it seems no evidence of actual success or otherwise can have been put to participants. Nevertheless this is a crucial part of the Report, because the key recommendation concerns the abandonment of the State approach to listing and the adoption of agreements similar to those permitted

under the Commonwealth scheme. Either the evidence of this view should be provided or the statement removed.

2.2.3 Assessing the impact of the current system

The Draft Report has been unable to quantify the extent of the negative impact which it identifies as arising from prescriptive heritage regulation on private property owners. Nevertheless it states in Draft finding 7.5:

“At the State, Territory and local government levels there is an over-reliance on prescriptive regulation to achieve heritage conservation objectives. In many cases, this has led to poor outcomes, through for example inappropriate listing imposing unwarranted costs (such as denial of redevelopment opportunity) and possibly perverse effects (such as destruction to avoid maintenance costs).”

There are no statistics provided evidencing the “many” cases of “poor outcomes” nor the extent of the costs. In fact the Commission’s own statistics appear to contradict this conclusion. Table B13 on page 239 of the Draft Report shows that a very small amount of development applications for heritage places were rejected by councils in 2004-5, the highest being 4.3% in South Australia, three States being between 2 and 3%, one State 1.9% and another State 0.2%. It is difficult to sustain an argument that listing leads to denial of development opportunities “in many cases” in the light of these figures.

Nevertheless the Commission quotes without reservation the submission of Alan Anderson who asks rhetorically:

“Is it correct for owners to have their property rights expropriated without compensation, through an arbitrary and capricious system? ... Heritage becomes theft” (p. 121).

If the evidence is lacking, Draft Finding 7.5 should be qualified.

2.3 Terms of reference not addressed

While some of the Productivity Commission’s findings are of value and identify problems in the actual implementation of heritage listing criteria as well as the lack of funding for the conservation of heritage, it has not used its clear expertise in the economic arena to suggest new modes of funding and management or examine those in use overseas.

This subject clearly comes within term of reference No. 4 which refers to the “positive and/or negative impacts of regulatory, taxation and institutional arrangements on the conservation of historic heritage places, and other impediments and incentives that affect outcomes” as well as term of reference No. 5: “Emerging technological, economic, demographic, environmental and social trends that offer potential new approaches to the

conservation of historic heritage places”. It is submitted that No. 5 has not been addressed at all unless one considers the introduction of conservation agreements by the Commonwealth Government to be an “emerging environmental trend”.

The extreme inadequacy of funding has been clearly identified in submissions. The Commission, despite its expertise in this area, has not put forward any creative means of funding heritage.

2.4 Selective Referencing

As observed in section 3.3 of this submission, and evidenced in its references, the work in cultural economics has significantly evolved since 1998. The most cited private work was McLeod’s *Planning Law in Australia* (1997: 11 citations), followed by Throsby’s *Seven Questions in the Economics of Cultural Heritage* (1997: 5 citations), then four other citations concerning Cultural Economics (1996, 1997), then three citations concerning economic valuation methods (1993, 1994).

There appears to be an awareness of the work of the economic culturalist J.M Schuster (see Section 7 of this submission) despite not being cited in the Draft Report at all, nor cited in any of the sources referenced in the Draft Report. If this work has been referred to, it should be added to the references. However other and more recent approaches to cultural economic analyses exist; if the Commission has not consulted these then there is a risk that it has conducted its inquiry with dated analytic tools and so reached conclusions that are already out-of-date.

3. Historical overview of heritage conservation and classification

3.1 *The history of heritage protection*

The development of official listings in Australia is mainly derived from the international context (especially the Athens Charter 1931, UNESCO Convention 1954, and the Venice Charter 1964).

Before the 1970s, heritage legislation in Australia was generally “piecemeal, sporadic, sometimes discretionary and often ineffective”.² Acts passed from the 1890s to the 1920s focussed on flora and fauna, while the built environment remained unprotected. However sections of the community did organise to protect historic places in the early twentieth century. For example a major conservation campaign attempted to save Burdekin House, a colonial villa in Macquarie Street, Sydney, from destruction in 1933. The activities of the Royal Australian Historical Society raised awareness of historic places through lectures and visits. The National Trust was formed in NSW after World War II and campaigned against the destruction of historic sites such as the Hyde Park Barracks; Subiaco, an 1830s villa designed for the Macarthur family which was eventually demolished for a car park in 1961; and St Malo, an 1856 property in Hunter’s Hill.³

The 1960s and 1970s saw a greater awareness of the built and natural environment emerge along with a new interest in cultural heritage. It was not until the election of the Whitlam Labor Government in 1972 that serious attention was paid to creating a national heritage agency. A Committee of Inquiry chaired by Justice Robert Hope was formed in April 1973. The Hope Report recommended a permanent, independent statutory authority which it wished to call the “National Estate Commission”. This in part reflected global heritage language: UNESCO’s Committee for the Protection of World Cultural and National Heritage spoke of an “International Estate”. The Hope Report also identified parts of the Constitution which could provide significant leverage in implementing heritage policies and aims. Australia ICOMOS was established in October 1976 and its Burra Charter, based on the 1964 Venice Charter, was adopted in 1979.

Ashton and Cornwall explain how heritage listing in the Commonwealth sphere was politicised and a source of controversy from its inception:

“Not long before the sacking of the Whitlam Government in 1975, the *Australian Heritage Commission Act* was passed. It provided for the creation of the Australian Heritage Commission (AHC). Section 30 of the Act obliged all federal ministers and agencies to guarantee that nothing – from considerations about the sale of federal property to the issuing of export licences – would be done to

² Paul Ashton and Jennifer Cornwall, “Corralling Conflict”, a paper presented at the Heritage Studies Symposium, University of Otago, July 2005.

³ See Joy Hughes, ed. *Demolished Houses of Sydney*, Historic Houses Trust of NSW, 1999.

adversely affect any place listed in the Register. Only when there was ‘no feasible or prudent alternative’ could a decision or action be made and even then impacts had to be minimised. ...

The AHC was established on 9 July 1976. By 1978, six interim lists had been published proposing more than 6000 places for inclusion in the Register of the National Estate. This attracted 1000 objections requesting the removal of 470 places from the lists. Anyone or any group could lodge an objection. Some were extreme. At least one clash between a rural community and the Commission came close to violence. The Australian League of Rights, a right-wing organization which was especially supported in struggling rural and regional areas – played on anxieties and developed several conspiratorial theories about the AHC. One of the League’s fronts was the Australian Heritage Society which attacked the Commission on a number of occasions... Mining industrialist, pastoralist and ‘self-made man’ Lang Hancock cast the environmental movement as the ‘Number One enemy of civilisation’.”

In the 1980s attention was focused on the kind of places which had been placed on the Register of the National Estate, and other registers kept by the National Trusts. They concentrated on grand homes and fine examples of architectural styles. Indigenous, industrial, multicultural, women’s, working-class and various other types of heritage were severely underrepresented. More recently with greater attention paid to the history of work, gender, indigenous and minority experiences specific efforts were made to redress this, however there is still a lingering` imbalance in the kinds of historical heritage places which are identified and protected.

3.2 *The development of listing*⁴

In NSW from 1945, amendments to the Local Government Act 1919 gave councils the power to make planning schemes that would include “the preservation of places or objects of historical or scientific interest or natural beauty or advantage”. In 1951 a further amendment provided that the Cumberland County Council could have historic places proclaimed by the Governor. In 1957 the first Cumberland County Register of Historic Buildings was published. The County Council was the consent authority for any development affecting these listed buildings.

The list itself was simply a list and contained no information about the sites. The first local planning scheme to be gazetted and contain a list of historic buildings which were subject to planning controls was that of the Municipality of Windsor in 1973.

Community awareness of heritage was galvanized by community action in the 1960s and 1970s, against high rise development and wholesale destruction of heritage areas by developers and Government. However it was not until 1977 that the Heritage Act was

⁴ This history is largely taken from *Heritage Listings in New South Wales: a brief history*, NSW Heritage Office, 2000.

enacted. It did not provide for a heritage list, but once a “building, work or relic” became the subject of a Permanent or Interim Conservation Order, the property was recorded in the register of such Orders. In 1987 the Act was amended to require government agencies to prepare Heritage and Conservation Registers of their property.

In 1985 a Ministerial direction required Local Environmental Plans (LEPs) under the Environmental Planning and Assessment Act 1979 to contain provisions for the conservation of buildings, works or relics listed in schedules of heritage items contained in LEPs. From 1979 the Heritage Council made grant funding available to local councils to undertake heritage studies for precincts and council areas so that they could identify heritage items for addition to the LEP lists.

The State Heritage Register (SHR) was established in April 1999 under amendments to the *Heritage Act*, listing items of particular importance to the people of NSW. It includes all places formerly protected by Permanent Conservation Orders and items identified as State significant in heritage and conservation registers prepared by State government instrumentalities. There is a fundamental difference between the SHR and previous lists. Items added to the SHR were to be listed on the basis of their significance to the State, aiming to provide protection and certainty before a threat arises.

The SHR is thus the first official heritage list established in New South Wales that expresses the ideas about heritage listing developed in the State Historic Preservation Plan of 1984. The Section 170 Registers under the Heritage Act, which only protect government owned properties, were an earlier, but more restricted, beginning to such a comprehensive list. Similarly, the Cumberland County Register of Historic Buildings of 1957 reflected the concepts outlined in the UNESCO convention of 1954. The practice of heritage listing in New South Wales has developed from several International agreements and British and American models. It has progressed from simply listing sites and addresses to requiring thorough research and documentation about why a place is significant, and therefore why it should be listed. This in turn has generated the need to rank levels of significance in terms of World, National, State, Regional, Local and Precinct significance, and so for comparative studies to be made of listed items. Heritage listings are now an integral part of the State’s planning system.

Initially, some regional differentiation in the development of listings within New South Wales was evident. This is disappearing as LEP listings become more widespread and inclusive. The distribution of items on the State Heritage Register is currently focused on the Sydney region. However, the continuing development of the Register through thematic and other systematic analyses, and the transfer of State significant items from LEPs to the Register means that they will become more geographically widespread over time.

3.3 *The emergence of cultural economics*

The Draft Report has drawn upon the work of Michael Hutter and David Throsby in the field of cultural economics. This field has its own history. In the 1960s a subfield of economics concerned with the arts emerged as a recognised area of research, with JK Galbraith and more particularly William Baumol the leading theorists. This research work applied the concepts of neoclassical economics to the spheres of art and culture. Artworks and cultural performances were viewed as a sort of commodity or sphere of economic activity, which had been considered as beyond economic or pragmatic concerns.⁵

Methodologies were developed to incorporate the arts and culture into economic discourses, often drawing upon “environmental economics” as a source of methodologies. Several overview collections were published in the 1990s of this earlier work, which began to be organised with formation of the Association of Cultural Economics International (ACEI) in 1979. The ACEI defines “culture” as:

“a class of economic activities and institutions that are associated with a society's efforts to realize its aesthetic needs, including, but not restricted to, (1) visual arts, including sculpture, paintings, photography, architecture; (2) performing arts, including drama, music, dance, films; (3) literary arts, including novels, poetry, essays, plays; (4) historic preservation/restoration; and (5) arts education.”⁶

Arjo Klamer is professor of the Economics of Art and Culture at Erasmus University in Rotterdam, holds the world's only chair in the field of cultural economics, and is a leading figure in the ACEI. In a recent essay, he argued that:

“...the mode of reasoning — where all goods need to have value as an instrument towards the goal of economic development — prevents us from acknowledging the special role that cultural goods play in the lives of people. ... Culturalists — archaeologists, art historians, historians, theologians — acknowledge the cultural values of things and understand scenarios in which cultural goods figure prominently regardless of their relationship to the economics of development. ... Most of my fellow economists inhabit the other world ...[and] see the price of everything and the value of nothing... while economists readily acknowledge imperfections in markets, they deny that this makes cultural goods necessarily exceptional ... The risk is, presumably, a chance that culturalists will influence politicians by impressing upon them the enormous value of a cultural good, justifying any amount of spending on it. Economists, therefore, have designed a

⁵ R. Mason, *Economics and Historic Preservation: a guide and review of the literature*, The Brookings Institution Metropolitan Policy Program, University of Pennsylvania, 2005.

⁶ (source: www.acei.neu.edu)

research strategy aimed at the elimination of the role of culturalists. Their goal is to develop methods and approaches that ‘objectify’ the valuation of cultural goods and thus render the subjective valuations of experts superfluous.”⁷

Klamer acknowledges David Throsby and Michael Hutter for their critical comments upon his essay. Hutter is the editor of the undergraduate text book *Economic Perspectives on Cultural Heritage*, published nearly a decade ago, and which appears from the Draft Report’s reference list to be the principal reference work in this area cited by the Commission’s researchers.

Why have cultural economists not been a feature of heritage discourses in Australia? The answer possibly lies in the way that heritage is conceptualized in Australia as an aspect of environmental planning, rather than as a cultural or economic activity. This is illustrated in the Draft Report, which contains several findings and recommendations which attempt to break the nexus between heritage and environmental planning (see pp. 149, 152, 156 [Draft Recommendation 7.2], 162, 171, 172 [Draft Finding 7.8], 192-194, 204-206 [Draft Recommendations 9.7, 9.8]).

3.4 Conclusion – lack of historical perspective

The Draft Report misconstrues the history of heritage in Australia by stating that current government involvement in heritage practice in Australia is “arguably” the outcome of “political activism of the 1960s and 1970s – in the form of ‘green bans’ and the like” (p. xviii), thus implying that current heritage practice has radical roots and is not supported by the population at large. In fact current heritage practice in Australia has been informed by a great variety of pressure groups over the course of the twentieth century, from the research of antiquarians, the lobbying of built environment professionals and community groups such as the National Trust, to the activism of building unions, middle class women and local resident action groups.⁸ There is also a long history of statutory heritage practice in environmental planning since 1945. While heritage practice is sometimes controversial, this is not necessarily a sign that it is operating unfairly, rather that the values with which it engages are strongly felt.

The failure of the Draft Report to demonstrate any understanding of the histories of either heritage conservation or cultural economics, or of the conflicted and contentious nature of work in both fields, is a major and fundamental flaw in the document. It leads the Commission to conclusions that are clearly biased in favour of economic values to the exclusion of the cultural, social and environmental values that are an integral element in any understand of heritage conservation in Australia.

⁷ Arjo Klamer, ‘Social, Cultural and Economic Values of Cultural Goods,’ (formerly titled ‘Cultural Goods are Good for More Than Their Economic Value’) *Cultural Economics*, (Japanese Association for Cultural Economics), vol.3, no.3, March 2003, pp17-38, reprinted in V. Rao and M. Walton (eds) *Cultural and Public Action* Stanford University Press, 2004.

⁸ Graeme Davison, ‘A brief history of the Australian heritage movement’ in G. Davison and C. McConville (eds) *A Heritage Handbook*, Allen & Unwin, Melbourne, 1991, pp14-27.

An outcome of the Draft Report's recommendations would be to substantially relocate heritage from the planning domain to the cultural domain, an area in which the Commonwealth, despite its lack of any formal cultural policy,⁹ has been more than happy to engage. This is evidenced, for example, in the Prime Minister's recent and past criticisms on the writing and teaching of history. Additionally it is known that the Commonwealth's financial powers in the cultural field are broad and accepted in contrast to its limited constitutional powers in land use planning.

Such a move would, in fact, be a continuation of the development of the cultural idea of a "national heritage" initiated with the Whitlam Government's *Register of the National Estate* in 1975 (although the Commission has of course recommended the abolition of this long-standing register).

The inclusion of cultural and social values, as well as economic values, in understanding heritage conservation must be addressed in the Final Report if it is to have any credibility. The ahistorical approach taken by the Commission has led it to misunderstand the causes of the development of heritage in Australia; while the failure to engage with well-established schools of cultural, social and environmental economics in preparing the Draft Report has skewed its findings and recommendations to reflect a very one-dimensional view.

4. Heritage and the market

Heritage property cannot be divorced from its property value. Market value is a constant pressure on the management of a privately owned heritage place. However "market based solutions" are not necessarily the best adapted when we are talking about social benefit. Approaching the appreciation of heritage from a market-based position is seeing only one side of the equation.

4.1 The privileging of private property rights

Some key comments from the Draft Report:

"Where such restrictions are imposed on privately-owned historic heritage places, the potential for encroachment of private property rights clearly arises" (p. 121)

"There is a question of principle. Is it correct for owners to have their property rights expropriated without compensation, through an arbitrary and capricious system? ... Heritage becomes theft. (Mr Alan Anderson, sub. 185, p. 2)" (p. 121)

⁹ D Throsby, 'Does the Australian Government Have a Cultural Policy?', *Dialogue*, 22/2, Academy of the Social Sciences in Australia, Canberra 2004.

“A key issue, then, is to what extent is the private sector able to reap (or ‘internalise’) the benefits of heritage conservation. In situations where sufficient benefits are able to be captured to make heritage conservation viable from a private perspective, the rationale for government involvement is greatly reduced, if not removed altogether.” (p. 13)

In summary, the Commission’s argument is that heritage listing is an encroachment on private property rights, and that the regulation attached to listing further diminishes property rights. There is currently no mechanism to assess the costs and benefits of government restricting private property rights (through listing), but restoring property rights will allow market-based solutions to elicit the true costs and benefits of heritage. This will provide the incentives for property holders to co-operate with heritage listing.

It is notable that any idea of cultural value or heritage significance is absent from this equation.

The Draft Report privileges private property rights as a prime cultural value in Australia. Historically and currently, however, all private rights are subject to other rights which they must interact with and sometimes give way to in the public interest. These includes the rights of others but also the rights of the Crown. The Crown may legislate to overrule some private rights; for example in New South Wales (unlike the Commonwealth) there remains a right of the State to legislate to appropriate private property with little or no compensation (*Durham Holdings v State of NSW* (2000) 205 CLR 399). The possibility of redressing this situation by Constitutional amendment was offered to Australians by referendum in 1988 but rejected.

4.2 An alternative view of private property rights

Environmental economists Paul Martin and Miriam Verbeek have written on the notion of private property and what they believe are common myths in the property rights debate. As their study¹⁰ was published by another Commonwealth agency only two years before the Commission began its inquiry, it is worth considering some of their key points as they relate to the primacy of private property rights evident throughout the Draft Report.

Martin and Verbeek’s definition of ‘private property’ is a good starting point:

¹⁰ P. Martin and M. Verbeek, “Property Rights and Property Responsibilities” in C Mobbs and K Moore, *Property Rights and Responsibilities: current Australian thinking*, Land & Water Australia, Canberra, 2002. (Land & Water Australia is a statutory research and development corporation within the Australian Government Agriculture, Fisheries and Forestry portfolio. It was established as the Land and Water Resources Research and Development Corporation in 1990 under the Primary Industries & Energy Research & Development (PIERD) Act 1989. Land & Water Australia's mission is to provide national leadership in generating knowledge, informing debate and inspiring innovation and action in sustainable natural resource management. - www.lwa.gov.au/about.asp)

“Private property: individuals have a right to undertake socially acceptable uses, and have a duty to refrain from socially unacceptable uses. Others (called ‘non-owners’) have a duty to refrain from preventing socially acceptable uses, and a right to expect that only socially acceptable uses will occur.”

This provides a rather different approach to the idea of property than that assumed by the Commission: reciprocal rather than exclusive. “Restriction” and “encroachment” give way to “acceptability” and “use”. Origins in Crown ownership and common law give Australian “private property rights” a very different status to derivation from provisions of the United States constitution, a status that some property rights activists are trying to import into Australia.

Martin and Verbeek consider that the word “property” has acquired an almost mystical political status, which is understandable given the dynamics of human behaviours over access to resources, but it adds little to dealing with problems of resource conservation and to balancing public and private interests. Attaching paramount importance to “property rights” slogans will not achieve an equitable and principled sharing of resources.

They identify a common argument in favour of private property rights: they provide an incentive for conservation and the pursuit of innovations. The greater the profit expected, and the more likely the profit is to be realised, then the stronger the incentive. The Commission appears to have worked with this assumption when they state that privatising heritage values will provide incentives to property holders for heritage listings. However Martin and Verbeek identify several flaws in the assumption. One is that other forms of property holding have been demonstrably effective in conserving resources, notably common property which has many potential benefits in situations of social and resource interdependence. Another is that the holder of private property rights must be able to trade with them free of any conditions, otherwise they will destroy the resource (see “vandalism” below). However, the creation of new forms of property, such as derivatives (the market for which is subject to a large number of conditions in order to create and maintain expectations of future profits that can be realised by transfer from one holder to another) suggest that this is simply untrue.

“Property rights are a political institution to regulate the balance between the interest of owners and society’s need to restrict activities that diminish the common wealth.”¹¹

With this statement Martin and Verbeek begin their discussion of the pressures associated with property expectations. Matters subject to property rights are not themselves constant as societies seek increasingly sophisticated ways of managing and using natural and cultural environments, which poses challenges for the concept of property rights. Martin and Verbeek identify eight such challenges in relation to natural environments, and at least five of them can be adapted to the cultural environments of which heritage items are a part.

¹¹ Martin and Verbeek, “Property Rights and Property Responsibilities” p. 5.

1. The “fractioning” of cultural values is necessary for market solutions to heritage problems, and the process of creating tradable fractions of cultural environments is likely to increase.
2. There is a growing emphasis on custodianship, sometimes attached to land and sometimes to other cultural property. Payments to custodians for conservation allow them to care for a heritage item.
3. Reconsidering the duties of property holders that attach to property rights makes it important for property holders to present themselves as responsible citizens, which in turn makes it easier (for them) to resist restrictions on their use of a heritage item, and to argue for compensation when restrictions arise.
4. The development of international treaties such as the World Heritage Convention and of international standards impact upon the management of markets.
5. With the decline of unconserved cultural environments (such as abandoned country localities or pastoral homesteads), debate about conserving or not-conserving them grows, reflecting questions of “non-use values”, which can be reflected in environmental planning law rather than property law.

Consider some of the implications of just the first of these points. Like water rights and carbon emission rights trading, the fractioning of “tradable heritage values” could allow the owners of heritage properties to trade on their decision to conserve, rather than demolish and develop their property. This decision could result in their acquiring certain “heritage conservation rights” for example which they could trade with other property owners who need them. A form of this already occurs in the form of “heritage floorspace rights” in the Sydney CBD which are able to be traded on an open market and purchased by developers.¹² Perhaps “cultural tree credits”, “sandstock brick futures”, or “wood smoke emission rights” will emerge as solutions to heritage management problems like the preservation of culturally-important tree plantings, the declining availability of traditionally-made building materials, or the polluting aspects of some traditional energy generation methods.

Or consider the third point: the inculcation of a sense of heritage responsibility or custodianship among property holders who are then, through the demonstrated responsibility of their conservation management actions, able to be fairly and openly compensated for any conservation-based restrictions for the benefit of the community placed on their property rights. Contrast this with the Commission’s picture of the embittered, embattled property holders struggling under the tyranny of a heritage listing that causes them to vandalise and destroy heritage places to retain the exclusiveness of their property rights. Which is the most likely to achieve a positive outcome: clarifying responsibilities and sharing the costs of heritage conservation, or enshrining property

¹² See City of Sydney Council submission to the Commission, #143 July 2005, p. 3.

rights that are already acknowledged as being outdated and inadequate for meeting the conservation challenges already evident?

The point of this discussion is that there are compelling arguments that privileging private property rights will not guarantee better heritage conservation outcomes. By reconsidering the notion of property and property rights, as is being done in the environmental economics field, heritage conservation invites the development of a number of market mechanisms that are diverse in their approach, and capable of being tailored to quite specific types of transactions.

The “one size fits all” approach, claimed to be the present mode of managing heritage conservation through listing and regulation, and of which the Draft Report is so critical, ironically can also be used to sum up the Commission’s proposed new system of property management contracts or voluntary conservation agreements (VCAs). It is also demonstrably limited in the types of heritage conservation outcomes that might be achieved when compared with just a few examples drawn from environmental economics. Unfortunately, the single-mindedness evident in the Draft Report’s recommendations concerning VCAs suggests that positive conservation outcomes are not the guiding principle, but simply a desirable effect that may flow from making private property rights the key organising principle of the heritage system in Australia. This is disturbing given that there are few concrete results in this field to draw upon.¹³

Martin and Verbeek argue that at the heart of debates about property rights is an argument about the extent of exclusiveness that is provided to the property holder, and its inherent problem in the question of compensation for actions by governments which impinge on the property holder’s interests. Advocates of compensation (such as the Commission) argue that compensation is desirable and necessary as it provides incentives for private conservation, and is fair, otherwise individuals bear an unfair share of the costs of the community benefits of listing.

However, another way to look at compensation is to see it as a claim on the public purse, which while decreasing some private costs increases the public costs of change and innovation. Compensation comes from the pool of government revenue, where claims have to compete with others such as health, education and so on. This does not negate an appropriate role for compensation *per se*, but makes clear the nature of a transaction in which payments are transferred from the public to a private interest, and suggests that compensation should be just one tool among several for achieving conservation outcomes.

How could compensation payments inhibit change and innovation? There is always a risk that the rigid designations of property rights required to support the Commission’s view that heritage is a restriction of the property holder’s interests will overburden the

¹³ Mike Young “Opportunities and Needs: a research agenda for heritage economics research”, in Australian Heritage Commission, *Heritage Economics: Challenges for Heritage Conservation and Sustainable Development in the 21st Century*, Conference Proceedings, Australian National University, Canberra, July 2000, pp. 243-247.

concept of property. This will result in higher transaction costs, reduce the flexibility in the potential uses of the heritage item, and reduce the economic incentives for many property holders. Entrenching private property interests above others in heritage conservation will freeze a new *status quo*, and so create barriers to responding to changing circumstances. A more legalistic approach to such adjustments may result in further delays, and higher costs (including compensation) whenever administrative changes to heritage management and access to heritage resources is needed.

The example of land use zonings, in which there may be expectations by some property holders that their property rights could be extended through rezoning, has never been considered a right but has always been considered an “entrepreneurial opportunity” (although submission #123 quoted on p. 184 seems to suggest that there are expectations of property rights inherent in zonings). If such expectations were to be considered a property right, rezonings would have to be individually negotiated (higher transaction costs), would always have to increase the value of the property (reduce flexibility in potential uses) or compensate the property holder if it didn’t (reduce incentives to achieve best outcome). It would also, of course, greatly limit the administrative and policy actions that could be taken in the public interest, as every rezoning would be a high financial costs to the community, forcing governments to greatly limit rezonings, effectively ossifying the planning system. The Commission’s proposed VCAs are just as likely to have a similar impact on the nascent heritage market if private property rights and their associated compensation are elevated above all other considerations.

5. The “subjectivity” of heritage assessments

The Draft Report states a number of times that heritage assessment is a subjective process:

“The definition of the ‘cultural significance’ of a place can be highly subjective and is dependent on community values and expectations, which can change over time. Classifying the degree of cultural significance introduces an added degree of subjectivity.” (p. xx)

“While the identification of heritage can be inherently subjective, classification of the degree of ‘cultural significance’ introduces an additional degree of subjectivity” (p. 10)

“The benefits of imposing statutory protection on a particular place are not well assessed, primarily because the process for assessment is inevitably subjective: ... the criteria for listing are ‘open-ended’ and subjective ... [those] undertaking an assessment may have (legitimate) differences in opinion ... the threshold for listing, and therefore regulating, a heritage place is set relatively low” (pp. 164-165)

“Currently ... whether there are other examples of that type of heritage place already listed is not considered” (p. 186)

The Commission never clearly identifies the factors which are supposed to make the heritage process subjective. The mere fact that heritage value cannot always be pre-determined solely by reference to so-called objective factors, eg date of construction, name of architect, famous occupant, but may have more fluid social significance, eg. a well-loved icon in the district, a history of long term use by a significant minority, spiritual significance, evidence of a significant historical event should not be accepted as evidence that heritage attributes are “subjective” and hence unreliable. The PHA submits that heritage criteria are only subjective insofar as individual human beings apply them; but this is the case for other disciplines such as medicine, law, engineering, economics or science.

5.1 *Diversity and significance*

The Commission’s terms of reference note that heritage items reflect the diversity of our society. While a historic Chinese temple may not mean the same to an Australian of British descent as it does to an Australian of Chinese descent, this does not mean that a heritage specialist cannot assess its significance based on its meaning and significance to that part of the Australian community as well as the wider community. The criterion of “social value” is one of the aspects of cultural significance under the Burra Charter and embraces the qualities for which a place has become a focus of spiritual, political,

national or other cultural sentiment for a majority or minority group.¹⁴ Equally some members of the community may value the home of an Australian sporting figure higher than the home of an Australian artist, but a heritage specialist will analyse the significance overall, taking into account the special significance it may have for one section of the community as well as for the region, State or nation. This does not of itself make heritage criteria “subjective”. While there may be problems in the individual application of the criteria, which are now well accepted, the use of checklists, threshold standards and benchmarks enable the identification and correction of subjective assessments.

Experts may differ in a particular case, or a member of the public may disagree with an expert; again, this is not much different from other disciplines. Possibly much of the alleged subjectivity referred to in the Draft Report may be attributable to the fact that different parties involved in heritage disputes seek out an expert who agrees with them, particularly where large potential profits are involved.

5.2 Future heritage – let the market decide?

Some key comments from the Draft Report:

“In the event that the preferences of future generations coincide with the preferences of current generations, this argument can be viewed as an extension of the externalities argument outlined above. The benefits from the listing would not only be those accruing to the current generation, but also to all future generations. However, it is much more difficult to sustain the argument that governments should intervene to anticipate the preferences of future generations. Governments may be no more successful in divining future preferences than markets. Indeed, they may face less incentives to cater for future preferences. Markets encourage owners to invest in attributes which may be considered valuable to future purchasers and users of a place, whether the purchasers and users are in the current generation or the next.” (p.117)

“...bequest values are likely to be of greatest relevance for iconic historic heritage places, and can be captured for the community through government ownership of the property. For less iconic properties, particularly those which represent a category of heritage which is not unique, the ... bequest values are probably less significant.” (p. 113)

The Commission states that “it is much more difficult to sustain the argument that governments should intervene to anticipate the preferences of future generations” (p.117). However a submission from Australia ICOMOS clearly identifies recent heritage as an

¹⁴ C. Johnston *What is Social Value?* Australian Heritage Commission, Canberra, 1992: “It has been suggested that social value can be equated to popular opinion... The argument expressed is about whether connoisseurs and experts or the general public should ‘select’ which places are valued. While voting may be a way of people choosing between alternatives, such an approach seems unable to deal with the complex process of understanding the attachment of people to place.”(p. 16)

area where lack of government intervention will lead to losses for future generations. It referred to the clearing of large swathes of inner city areas in Sydney and Melbourne to make way for commercial developments which was made possible in the 1950s and 1960s in the absence of effective heritage regulation or accepted criteria for determining heritage significance (p. 109).

The economist David Throsby identifies “intergenerational equity” and “the precautionary principle” as two principles which should guide decision-making about heritage sustainability.¹⁵ The first requires the interests of future generations to be acknowledged; the second states that decisions which may lead to irreversible change should be approached with extreme caution and from a strongly risk-averse position. Guided by these and other principles, the PHA submits that it is not in fact “much more difficult” to sustain an argument that government should intervene. These principles are relevant to government decision-making of all kinds, from environmental issues to international relations.

There are many twentieth century heritage items which are not yet regarded as “heritage” by the public and hence not recognized as having market value, but hold potential market value for the future. In some cases governments need to act now to preserve for the future. This is a recognized position amongst heritage bodies and museums. The organisation DOCOMOMO, established in 1990 in the Netherlands, documents and educates government and the public about twentieth century buildings of the Modern Movement which are at risk.¹⁶ The Twentieth Century Heritage Society is also committed to protecting and promoting the architecture and design of the twentieth century.¹⁷

It is true that community attitudes to heritage may change. But there is the ability, through study of past heritage and use of established heritage criteria, as well as community consultation, to identify some of the places that will be heritage items in the future. An example would be the home of a famous figure whose work will remain significant after their death eg. Patrick White (whose home was recently listed on the NSW State Heritage Register). The more recent widespread recognition of post-contact Aboriginal history means that more sites important to Aboriginal communities since 1788 will probably be investigated as future heritage places; a number of sites have been identified by Aboriginal communities as suitable for listing.¹⁸

¹⁵ David Throsby, “Conceptualising Heritage as Cultural Capital”, in Australian Heritage Commission, *Heritage Economics: Challenges for Heritage Conservation and Sustainable Development in the 21st Century*, Conference Proceedings, Australian National University, Canberra, July 2000, pp.12-14.

¹⁶ www.docomomoaustralia.com.au

¹⁷ <http://www.twentieth.org.au/>

¹⁸ Sample information from the NSW State Heritage Register: a search for items listed under the Historical Theme of “Aboriginal culture and interactions with other cultures” revealed seven items with Aboriginal culture as the principal theme which relate either wholly or in part to post-contact history. Further such items are being considered: see NSW Heritage Office Annual Report 2004-5, p.23. See also Gisele Menage, “Contested Spaces, Contested Times: The ‘Day of Mourning and Protest’ Site”, *Public History Review*, 7, 1998, 119-139 which sets out the divisive issues raised by the consideration of the Cyprus-Hellene Club, which had been the site of the Aboriginal Day of Mourning and Protest site in 1938, for a Permanent Conservation Order on the basis of its indigenous heritage significance.

To prove its thesis that we cannot anticipate the heritage significance of contemporary items, the Commission relies on the example of the Sydney Opera House, built on the site of Fort Macquarie and a tram depot (p. 117). If it could be guaranteed that in every case a heritage building would be replaced by something as iconic as the Sydney Opera House which was itself constructed to provide a public benefit and is now proposed as a World Heritage Item, perhaps the argument put by the Commission could be sustained. But the Commission is relying on a once in a century exception to prove its thesis that the market should be allowed to decide what survives. Moreover, it is an exception which has no relevance to buildings in private ownership — both the Opera House and the buildings it replaced are public buildings.

The statement that:

“...the overwhelming majority of historic heritage places existed prior to explicit government involvement in historic heritage conservation *and were therefore conserved through private initiative*” (p. 117 – emphasis added)

also cannot be used to justify leaving the future of our heritage to the market. The Commission does not refer to any evidence that the “overwhelming majority” of present heritage places were preserved through private efforts rather than through lack of suitable building technology to capitalize on the site, planning controls, lack of market interest, or lack of economic opportunity. It can only be presumed that were there any such evidence, the Commission would have pointed to it.

History demonstrates that market forces are arbitrary when it comes to heritage preservation. Many significant historic urban properties survived until the late nineteenth century when an economic boom led to subdivision of estates and land speculation. Still more fell to the developers from the 1920s when new building technologies and market demand made it possible and profitable to build large blocks of flats on their large landscaped grounds.¹⁹ The history of areas such as Paddington and Surry Hills in Sydney are evidence of the fact that areas regarded as slums are usually safe from redevelopment until they become the site of Government activity, or property prices rise. Gentrification of heritage areas over time saved many heritage buildings but also raised property prices, creating incentives for development.²⁰ The statement on p.117 should be withdrawn as it is misleading and unsupported by any evidence.

This is not to deny the fact that there are some private owners who value their heritage properties and want to conserve them. Where possible, those persons should be approached concerning the making of an agreement that will ensure the property’s conservation and they should receive compensation for their contribution to the social

¹⁹ For numerous examples see Joy Hughes, ed. *Demolished Houses of Sydney*, Historic Houses Trust of NSW, 1999.

²⁰ See for example Christopher Keating, *Surry Hills: The City’s Backyard*, Hale and Iremonger, Sydney, 1991, pp.99-109

good and/or incentives for the future if they agree to such controls. But the PHA can see no evidence to justify abandoning regulation altogether.

6. The case of heritage vandalism and despoliation

Some key comments from the Draft Report:

“The EPHC also noted that there had been no comprehensive survey of places whose heritage value has been destroyed, either as a result of neglect or through modification or demolition.”(p. 36)

“...sellers disguise or destroy heritage values to prevent listing or expend resources to remove the property from the list. Under these circumstances, the decline in property values, and consequent reduction in incentives to conserve, can be viewed as a government, rather than market, failure.” (p. 116)

“At the State Territory and local government levels there is an over-reliance on prescriptive regulation ... In many cases, this has led to poor outcomes, through, for example, inappropriate listing imposing unwarranted costs ...and possibly perverse effects (such as destruction to avoid maintenance costs).” (Draft Finding 7.5)

“One council reported that a dispute over a development application for a historic building ended when the building was destroyed by fire under suspicious circumstances.” (p. 238)

6.1 Causation

The language and cases used in the Draft Report, examples of which appear above, suggest by their language that such behaviour may be not only economically rational, but also directly attributable to lawful government action rather than to the individual or corporation responsible. The language even implies support for such tactics, regardless of the costs inflicted on the community and neighbouring properties.

And yet, as Martin and Verbeek observe, “...association is not the same as causation.”²¹ The Commission does not provide any evidence (beyond anecdote) that the rates of property destruction are significantly higher in heritage listed properties than non-listed properties. These claims are simply reflect what may be commonly-held opinions which happen to coincide with the Commission’s own theoretical assumptions. While there are instances of destruction or neglect of heritage, there is no evidence that this would not happen anyway (see case study).

²¹ Martin and Verbeek, ‘Property Rights and Property Responsibilities’, p.7.

7. The alleged tendency to over-list heritage places

Some key statements from the Draft Report:

“there are strong incentives to ‘overlist’ properties and to under-provide for their conservation” (p. xxix)

...an increase in the proportion of listed properties over 100 years of age ... may be indicative of a tendency over the past two decades to overlist this type of property” (p. 137)

“Governments have come late to intervening in historic heritage conservation ... the foundation of official lists ... were usually lists developed by National Trusts ...[and] the heritage professionals’ criteria for indentifying heritage places (based on the Burra Charter) ...[which has] encouraged an uncontrolled growth over time” (p. 164)

“...the assessment process does not prioritise places according to heritage significance or conservation need .. the community has an incentive to overlist as they do not bear the costs of conservation” (Draft Finding 7.6, p. 167-7)

“...the management of heritage conservation under local planning schemes is not working well, primarily because ... [of] the application of heritage controls to places that have little, if any, heritage significance... “ (Draft Finding 7.8, p. 172)

The so-called ‘over-listing’ argument appears to be mainly derived from Schuster²² (not cited in Draft Report References), and is a strong theme in the submission of Anderson (submission#185, 10/12/2005). While Anderson simply repeats the word as a rhetorical device²³ without bothering to define it in any way, Schuster identified the following characteristics of heritage lists:

- they continue to grow because buildings that survive for long enough will eventually reach a criterion for listing;
- thematic surveys consciously seek buildings to add to lists;
- new types or categories of heritage are constantly invented, for example cultural landscapes;
- rent-seeking, in which private owners demand listing to access financial benefits irrespective of heritage merit, occurs frequently;
- low thresholds are used for listing;
- “true-believing preservationists” try to make lists as long as possible because they can; and

²² J.M. Schuster, *Making a List and Checking It Twice: the List as a Tool of Historic Preservation*, The Cultural Policy Center, University of Chicago, 2002.

²³ Anderson’s submission may be treated as a polemic; it is an article which appeared in the Sydney Morning Herald as well as online and in which he accuses heritage preservation of being infiltrated by “Australia’s activist fringe”.

- there is an inherent urge for the State to control things.

Schuster also claims that lists are often used by others for purposes for which they were not originally intended, and quotes Goering's directions in 1942 to the Luftwaffe to bomb every historic building and landmark in Britain marked in a *Baedeker* guide (hence "Baedeker Raids"). But neither Schuster nor Anderson ever seem to have asked: over-listing compared to what? If there is over-listing, are there also instances of underlisting, and some point of equilibrium which Goldilocks might call "just right listing"? Is over-listing a matter of numbers, or a concentration on listing on particular types of heritage items? There are some 1500 items on the NSW State Heritage Register, which account for just 0.05% of the some 3 million parcels of land in the State - is that over-listing, underlisting, or "just right listing"?

As Martin and Verbeek argue, rights-holders too have an incentive in limiting other people's entitlements in order to increase the value of their rights. The fewer heritage items, the greater the price of heritage values, thus creating and maintaining a market. It may seem extreme to argue that heritage property owners have an incentive to limit the number of properties listed and protected — but is it any more extreme than arguing that heritage professionals have an incentive to over-list?

The Draft Report seems to be consistent with two of Schuster's criteria: buildings will continue reach thresholds by virtue of their age, and "true-believer preservationists" (apparently National Trust members and Burra Charter-scribbling heritage professionals) control the heritage system. The Draft Report demonstrates no awareness of the rates at which nominations are rejected (either administratively, or later as a deliberate decision), or whether nomination rejections are based upon failures to reach criteria thresholds, or anything else, or of the fact that no Australian jurisdiction uses an age criterion.

In this context, the claims in the Draft Report that nationally 'iconic' buildings will always remain in public ownership (pp. xxxvii, 25, 46, 50, 67) become questionable. If the market value of their heritage values attracts a high enough price, why would government resist transferring them to the private property market? The sale of the iconic Sydney General Post Office in Martin Place, the Walsh Bay Wharves and the attempt to lease the Sydney Quarantine Station to a private enterprise for 99 years, demonstrate the reality that "iconic" status in the Commission's proposed heritage system will be just another marketing device.

8. Considering management before significance

Some key comments from the Draft Report:

“The principle of purchasing public-good heritage characteristics from private owners ... provides a mechanism for choosing which heritage places to list, protect and conserve” (p.186)

“Statutory listing [would] become, in effect, a list of agreements...” (p. 187)

“Negotiated outcomes would allow community representatives to better incorporate conservation costs into decisions of which places should be awarded heritage status” (p. 190)

“properties would only be included on a statutory list once an agreement has been reached, and would remain on the list only so long as an agreement was in place. The list or register would, in effect, become a list of agreements, recognising the contribution of owners and the wider community towards conservation, providing information to the community on the use of public money,...” (p. 198)

“As the heritage attributes of properties are managed via conservation agreements, heritage matters would not generally enter into planning decisions for other properties, that is, properties not covered by either a conservation agreement or included on an existing statutory list. This would involve repeal of any general provisions in planning legislation requiring local councils to consider heritage matters when making planning decisions.” (p. 204))

“...In the first instance, depending on the nature of the heritage characteristics being sought, and the availability of other properties offering similar characteristics, government may negotiate with alternative owners, including by tender.” (p. 200)

8.1 *Dismantling the heritage system*

In developing its model for property management contracts or voluntary conservation agreements (VCAs), the Commission has given the issue of property management a higher priority than that of heritage significance.

The purpose and process of the entire heritage system has in effect been reversed in this model. The organising principle of the Commission’s proposed market-based heritage system would not be heritage significance, but pricing mechanisms for the purchase of heritage values. A heritage register or list would actually have no cultural or research value. It would be simply a filing system for VCAs, which is illustrated by the ease with which properties (not heritage places) can be removed from a register or list — simply by a property holder withdrawing from their contractual arrangements. Having had the file removed from the property contracts filing cabinet, the property would no longer be

considered to have any heritage values (with one consequence being to increase the price of the heritage values of properties remaining under contract).

8.2 Heritage significance is linked to “place”

Understanding the concept of “place” is critical in any understanding of the heritage system in Australia (and most other places). The Burra Charter definition reads:

“Place means site, area, land, landscape, building or other work, group of buildings or other works, and may include components, contents, spaces and views.”

This is the definition of “place” that is generally accepted for heritage purposes across Australia and of which the Commission seems largely unaware. For example, its recommendations do not seem to recognize that a heritage “place” may not be a building, but a landscape, a street, a town or an archaeological site. Its proposals would effectively put an end to this concept, as the complexity of negotiating multiple agreements with persons who have legal interests in, for example, a city street, would be too resource-intensive to contemplate.

The Burra Charter provides an understanding of the connection between “place” and “cultural significance”:

Cultural significance is embodied in the place itself, its fabric, setting, use, associations, meanings, records, related places and related objects. Places may have a range of values for different individuals or groups.

This critical connection is evident in all earlier versions of the Charter back to the first version adopted in 1979, and is also evident in the earlier international conservation charters, tracing a genealogy back to Article 7 of the Venice Charter of 1964²⁴, and before that to Resolution 6 of the Athens Charter of 1931.²⁵ The “monument or “historical site” are the equivalent of the “place”, and are central to understanding nearly a century of the evolution of heritage conservation.

This lack of understanding by the Commission simply reflects the primacy of traditional economics in the Commission’s thinking. This, in turn, leads the Commission to focus on “values” rather than “place”, and to ways of attaching private property rights to the ‘externalities’ these values represent, which can then be traded in the market place. As transferring the place to another location is unlikely (although there are examples of this, but with high transaction costs), it is the values which are required to be transferable. The effect is to disconnect heritage values from heritage places, and to give heritage values a primacy over heritage places — simply because they are more amendable to the Commission’s proposed market-based heritage system.

²⁴ 7. A monument is inseparable from the history to which it bears witness and from the setting in which it occurs...

²⁵ 6. Historical sites are to be given strict custodial protection

De la Torre and Mason, in a paper on “Economics and Heritage Conservation”, argue that decision makers are turning to “economic considerations”. Culturalists argue that conservation is not an end in itself, but a means to an end or ends, such as cultural confidence, cultural diversity or a strong sense of place — the sort of ends usually considered to be social values. However, more and more economic measures of the value of heritage are being used, and economic rationales to justify conservation required. One economic concept that is crucial to understand in the cultural field is that of “opportunity cost” (that is, the theoretical value of a foregone alternative, or the theoretical benefit that would have been derived from an alternative use of a resource).

In many cases, say de la Torre and Mason, it is safe to say that alternative investments of the resources invested in heritage conservation could bring a higher economic return. Attempts to quantify the economic benefits of investment in culture or conservation will usually be destroyed by “opportunity cost” scenarios, unless it can be shown that other (non-economic) benefits can justify the investment in culture and conservation. This illustrates the point that standard economic analyses do not fully measure the values of heritage, either to individual property holders or to the community, and need to be supplemented by other kinds of information. If one agrees to translate all heritage values into terms of price, and argue for conservation on the grounds that it is economically rational, the “opportunity cost” card will generally provide opportunities that pay better. Thus we arrive at a conceptual problem when cultural values are measured solely in terms of price: meanings, memories, beauty, spirituality, and other values that are fundamental to understanding heritage conservation are lost in the discussion of transactions and prices and markets. De la Torre and Mason conclude by asking:

“Do we preserve ‘things’? Or do we preserve timeless, universal values? What kind of values, and whose? This is particularly urgent [to address] vis-a-vis the ascendance of economic language and business logic in all parts of society.²⁶”

The Draft Report indicates that it is values, especially economic values, that are to be conserved and enhanced, and that separating “place” and “values” is central to this approach.

A place that has the desired values is selected, then a VCA is made with the current property holder(s), until such time as the property holder(s) decides to withdraw from the contract. Another property with what are regarded to be similar “heritage values” need not be preserved at the same time, since such values are regarded as transferable. If the property holder then withdraws from the VCA, another property with “similar” values is located and another VCA entered into. If no other property with similar values can be found, or a property holder is unwilling to enter into a contract, then the community just has to accept it.

The Commission’s proposed approach is analogous to that of the nineteenth century acclimatisation societies, which moved (when they could catch them) unusual or

²⁶ De la Torre and Mason, *Economics and Heritage Conservation*, p. 5.

interesting species to reserves to breed them and maintain them as a sort of zoo, divorced from connections to natural habitat, or any understanding of the role of habitat places in a species survival. Individual animals were reduced to curiosities, while habitat destruction (in the form of land settlement) continued safe in the knowledge that curiosity species had been “rescued”.

There is no understanding of the role of place, or of the cultural significance of a place in the Commission’s recommendations. “Heritage values” cannot be simply transferred or relocated to another place, or found replicated in another place — even though this might be a desirable characteristic in the Commission’s idealised market based heritage system. The effect is to reduce heritage items to mere curiosities whose value is reflected in a market price at the time of any transfer, which presumably involves some speculation that the price will increase as the resource becomes scarcer, or if it doesn’t, then the right to destroy and rebuilt on the property.

8.3 The role for heritage agencies

It can be imagined that such a system would no longer require States and Territories to maintain any heritage administrative agencies. The comparison and thematic functions could be contracted to a private consultancy, while the negotiation of property management contracts will require legal expertise, and so could probably be delegated to legal advisers. The approval roles of State and Territory agencies will presumably be rendered superfluous by the contract system, and so could be abolished. It follows that there will be no real need to retain State and Territory heritage legislation either. Instead, the Commonwealth could delegate various heritage identification functions to the states and territories in a similar way to which it now delegates authority under the *Historic Shipwrecks Act 1976* which they in turn could also contract to a private provider.

However there is a general assumption, alluded to in section 9.3 (p. 195), that State and Territory heritage agencies will continue to function as they do now, although greater attention will be needed to making comparisons with what is already listed and using themes to categorize what is already listed. It would seem that heritage agencies will be identifying gaps in their matrices of “protected heritage values” (p. 196), and then somehow seeking out the properties that might have such values attached to them, and then initiating some negotiation process with the property holders. This appears to suggest that heritage values (not heritage significance) will determine which property holders are to be targeted for the offer of a VCA, or to submit tenders for such contracts.

Martin and Verbeek, in considering the misapplication of American property ownership concepts to Australia, consider that there is little evidence to support views articulated by property rights advocates that “better specified property rights ... rectify problems of balancing individual and collective interests and ensuring equity”. Making heritage listings dependent upon pricing and upon financial compensation is likely to require some

sort of legal proceedings, especially in case of disputes, and as Martin and Verbeek succinctly note: “It seems likely that it will provide more work for lawyers.”²⁷

The Commission’s proposal that compulsory resumptions (another legalist mechanism) could be used as a lever in such negotiations seems to be made in the absence of any evidence, providing the illusion of a useful tool that has rarely, if ever, been used for a heritage conservation purpose. Given the primacy of private property values infused throughout the Draft Report, it is difficult to imagine any situation in which it would be politically acceptable to use property resumption.

²⁷ Martin and Verbeek, “Property Rights and Property Responsibilities”, p.7.

9. The three-tier national framework

Some key comments from the draft report:

“The three-tier legislative framework is an appropriate model for government involvement in heritage conservation ... consistent with the principle of subsidiarity, aligns the scale of heritage conservation with its level of government decision making” (Draft Finding 7.1, p. 153).

“Endorsement of the principle of subsidiarity .. implies that there should be clear delineation of roles and responsibilities...” (p. 190)

“The three-tier framework for government intervention in the conservation of historic heritage places emphasises the key responsibilities of State and Territory governments ... Their role is absolutely crucial to a coherent and effective national framework. To implement the Commission’s recommendations for improvement to conservation outcomes at the State and Territory level would require legislative, institutional and operational changes.” (p. 192)

“State and Territory governments should remove the identification and management of heritage, zones, precincts or similar areas from their heritage conservation legislation and regulation, leaving those matters to local government planning schemes” (Draft Recommendation 9.8, p.206)

“As the heritage attributes of properties are managed via conservation agreements, heritage matters would not generally enter into planning decisions for other properties, that is, properties not covered by either a conservation agreement or included on an existing statutory list. This would involve repeal of any general provisions in planning legislation requiring local councils to consider heritage matters when making planning decisions.” (p. 204)

9.1 Problems with the three-tier framework

Considering that the main implication of the Draft Report is a fundamental change to heritage practice at the level of local government, it is ironic that it states:

“The three-tier legislative framework is an appropriate model for government involvement in heritage conservation. It delineates the responsibility of each level of government for historic heritage conservation and, consistent with the principle of subsidiarity, aligns the scale of heritage significance with the level of government decision-making.” (p.xl)

This statement surely brings into question the existence of a Commonwealth Government-appointed Commission to investigate the heritage industry in Australia. In fact the three-tier legislative framework for government involvement in heritage conservation in Australia has many problems and difficulties which deserve better

analysis than is offered in the Draft Report. The main problem is not that local government is over-listing heritage properties of marginal value, but that there is too much potential for inexperienced or unwilling local governments to under-list the heritage of their local areas and to allow heritage items to be forever lost in exchange for questionable immediate economic benefits.

The Draft Report makes no recommendations for how the proposed extensive overhaul of local government legislation, which will in effect completely demolish the local heritage system, and exclude local community involvement in the heritage system, is to be achieved. The Commission seems to be implying that there is no such thing as local heritage, that there is only 'iconic' national heritage values and a potential heritage market. Will the Final Report be recommending that the Commonwealth link future heritage funding to the States and Territories with implementing the recommendations of the Final Report? If not, what mechanisms are to be proposed? The rather plaintive final sentence of the Draft Report, which reads in part:

“Participants are invited to comment ... in particular on the management of heritage areas by local government...” (p. 206)

seems to indicate that the Commission either has little idea of the actual experience of local heritage management, or was still seeking evidence that would support its narrow economic view of heritage. Either way, it is a very disappointing conclusion to the Draft Report.

The Final Report needs to demonstrate through a much more extensive and sophisticated analysis and understanding of the role local government plays in heritage management, including at least some degree of understanding of the values of local heritage within the context of local communities; and providing some guidance on how its proposals regarding local heritage are to be implemented.

10. Getting the incentives right – another view

It can be argued that there is a “mutual suspicion” between those involved in studying and protecting heritage and economists.²⁸ This Commission inquiry has been the occasion for a meeting of the two disciplines at a stage when how the concepts might work together is still being determined.

Throsby has accepted the use of the term “cultural capital” and his concept of it attributes to heritage items values which are not homogenous and transferable but aesthetic, spiritual, historical, social, symbolic and unique. He argues for both economic and heritage value to be considered in evaluating a project. The Commission argues that we must “get the incentives right” but it is speaking of economic incentives, not incentives like a desire to preserve for future generations, a concern for the environment or a sense of identity through heritage.

Further, the Commission’s proposals for providing incentives in the form of compensation under an agreement do not examine the different kind of incentives which might appeal to a person who owns a heritage property, would like to see it survive but can’t afford to restore it; the person who wants to realize the maximum profit on sale; and the property developer who has purchased a site with the simple intention of demolishing it and making a profit.

Property owners who might anyway be inclined to protect their property in return for some financial incentive, will be poorly compensated in comparison to the property developer because they are not seeking to develop their property, in contrast to an owner seeking full commercial value for the development potential of a property they see only as a commodity.

Thus placing private property rights first would ensure that those who sacrifice the most and provide the greatest benefit for the community will in fact receive the least reward. It also removes the incentives for the Government to research and study unlisted heritage places, as well as the incentive for owners to notify anyone before they alter or demolish their unlisted property. The question of what incentives will actually ensure a better outcome for heritage, the public and the property owner must be more closely examined before settling on any one solution.

²⁸ Throsby, “Conceptualising Heritage as Cultural Capital”, p. 10

11. Conclusion

In reviewing the Draft Report, the PHA has come to the following conclusions:

1. The Draft Report has a number of significant flaws, including:
 - It does not examine all the terms of reference. Terms of reference 4 and 5 in particular have not been fully addressed.
 - It does not proceed on the basis set out in the terms of reference, that “the conservation of our built historic heritage is important”, and “there is a need for research to underpin how best to manage the conservation and use of heritage”.
 - It places the interest of private individuals and corporations above that of the community, contrary to its stated purpose.
 - The Commission has not conducted verifiable research in key areas, and does not distinguish between anecdotal and verifiable evidence. In at least one case its findings are in conflict with the quantifiable evidence contained in the Report.
 - In some cases it makes findings as to the views of the majority of participants with no reference to figures. It relies heavily on submissions and quotes them selectively.
 - The Commission does not appear to have consulted the most up to date scholarship on cultural economics, an area which is highly relevant to its inquiry. The report is less authoritative as a result.
 - It does not appear to have included all relevant sources in its list of references.

2. The Draft Report demonstrates an incomplete understanding of the history and practice of heritage classification, protection and legislation. Nor does it seem to appreciate the history of land planning and development in Australia, attributing as it does the preservation of what heritage is left solely to “private initiative” rather than economic factors, government intervention/lack of action, or planning controls.

3. The Report seeks to treat heritage regulation separately from planning regulation, without explaining why or how this can work in practice, particularly at the local level.

4. The Commission’s approach has privileged private property rights as against heritage, but its view of property rights is static and conservative, ignoring more recent theories, as well as the extensive history of the infringement of private rights by regulation outside the heritage field.

5. The Commission finds that the identification of heritage significance is “subjective” and hence unreliable, without ever identifying the factors which make it so, or demonstrating an understanding of the skills involved in heritage assessment.

6. The Commission’s view of a market in heritage fails because it does not take account of the importance of the concept of “place” in heritage significance. The significance of a place is embodied within it, its fabric, setting, use, associations, meanings, records, related places and related objects. It cannot be transferred or relocated to another place, or found replicated in another place.

7. The Commission finds that there is a tendency for heritage agencies to “over-list” heritage items without ever stating what the benchmark should be, or providing any evidence of this alleged tendency. This shows a lack of understanding of the economic and often political considerations which frequently inform the final decision as to whether a heritage item is added to a statutory list.

8. The Report’s treatment of the destruction of heritage places by their owners regrettably suggests that such behaviour (which is illegal, if a place is protected by law) may not only be economically rational, but deserving of sympathy.

9. While the Draft Report does identify the lack of funding, it does not investigate new or alternative sources of funding for heritage so as to compensate or provide incentives to private owners. Nor does it investigate the costs of its own recommended conservation agreements.

10. The Commission’s key recommendation 8.1, which provides that privately owned properties should be included on a national, State or Territory or local government Statutory heritage list only after a negotiated conservation agreement has been entered into and should remain listed only while an agreement is in force, if adopted, has the potential for a widespread negative impact on heritage protection and the public benefits it provides, because:

- it removes any incentive for heritage authorities to identify, research or list heritage items;
- the likelihood that governments could or would fully compensate an owner for the loss of development opportunity is remote;
- owners who might anyway be inclined to protect their property in return for some financial incentive, will be poorly compensated in contrast to an owner seeking full commercial value for a property they see only as a commodity. Thus those who sacrifice the most and provide the greatest benefit for the community will receive the least reward;
- those items for which it is not possible to reach agreement will be destroyed or fall into decline because there will be no or limited protection without an agreement;
- if a property is not listed because there is no agreement in place, there will be no requirement for the relevant heritage agency to be notified before any development, thus creating a greater risk of the secret destruction of heritage items;
- the proposed agreements do not run with the land, but must be renegotiated when the property changes hands. This will incur additional costs and is impractical to monitor;
- the scheme as a whole is simplistic because it equates heritage values to economic values; and
- existing heritage lists which inform us about the state of our heritage, help to rank heritage significance, and act as a guides for planning and future research, will

instead become mere ledgers of those properties it was economically possible to preserve, and their market value.

The PHA however supports the use of heritage agreements as an adjunct to existing regulation and considers that those owners who are willing to forgo additional income in order to conserve their property, or are willing to act as custodians for the future, deserve some financial recognition of their efforts.

11. The Draft Report adopts a “one size fits all” approach without investigating other approaches, or considering whether a multiple set of approaches is desirable. The Commission’s Final Report should attempt to demonstrate an understanding that there are other competing views on managing private property rights in keeping with conservation, investigate other models, and give some satisfactory justifications as to why it prefers any one model to the exclusion of others.

12. The three-tier legislative framework for government involvement in heritage conservation in Australia has many problems and difficulties which deserve better analysis than is offered in the Draft Report.

Appendix — Case Study in heritage destruction

The Draft Report argues that “prescriptive regulation can lead to ineffective, inefficient and inequitable outcomes’ (p.xvi). It represents current heritage practice in Australia, especially at the level of local government, as irresponsibly listing properties of “small” heritage value (pp.xix-xxx) and failing to compensate private owners — resulting in “poor outcomes, through for example, inappropriate listing imposing unwarranted costs (such as denial of redevelopment opportunity) and possibly perverse effects (such as destruction to avoid maintenance costs)” (pp.xl-xli) .

The Sheoaks provides an example of the supposed problem of “ineffective, inefficient and inequitable outcome” that the Report seeks to ameliorate. The Sheoaks was a house set on almost one hectare of land overlooking the picturesque of Pittwater in Sydney. The Sheoaks was thought to be the first fibro-asbestos houses built in Australia, designed by Sydney University’s medical professor James Thomas Wilson in 1908 and illustrated in a prominent building magazine of the day. Associated with this important identity in academic circles in NSW, the house also represented an intact example of an austere middle-class beach house that featured moveable heritage left by successive generations of the prominent family and friends. It may also have served as a technical resource in measuring the long-term weathering of fibro.

However it was inherited by several siblings who were involved in a dispute over its subdivision potential in court, and who had been ordered to sell the property. On the day before the auction, the NSW Planning Minister authorised an Interim Heritage Order for 12 months to allow its heritage potential to be properly assessed. It should be stressed that this was not a permanent listing, and would not be made permanent if the house was found not to be of State heritage significance. The house was burned to the ground overnight, destroying the heritage fabric and causing a significant immediate environmental danger to neighbouring properties due to asbestos contamination.

The litigation had focused on whether the property should be subdivided with the house conserved within a relatively large, heritage-informed curtilage, or whether the house should be kept but on a smaller curtilage that allowed greater profits to be derived from the subdivision. The difference in development potential might have been a \$5 million profit versus a \$6.5 million profit overall.

This case allows consideration of the rights and wrongs of the present system versus the Draft Report’s proposed system of heritage management. Here even an attempt to investigate the property failed, since the fire destroyed it before it could be investigated. Would a negotiated VCA have been effective in this case? It must be questioned whether most ordinary citizens would be happy for the Government to pay \$1.5 million in compensation to owners who were already due to receive \$5 million by inheritance.

It might have been impossible to reach an agreement with all the owners. It appears that the financial incentive was not of similar importance to all of them. If the Government

decided that it would not pay the difference, the property would stay unlisted, would be subdivided in a non-heritage manner and might well be demolished at the convenience of a future owner.

The Draft Report's suggestion that a similar property nearby instead be negotiated for heritage listing would be impossible to implement as there are no properties in NSW with the singular combination of significance attributed to The Sheoaks. Thus in this case the proposed system of heritage management does not offer a less "ineffective, inefficient and inequitable outcome" than the present system.

While the present system has its faults and inequities, it must be questioned whether the "incentives" promoted by the Commission will always be suitable or available and whether they will be sufficient to meet property owners' expectations.

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