
9 Getting incentives right for privately-owned heritage places

There is widespread support for the objective of heritage conservation. However, the current mechanisms are too focused on requiring private owners to supply, at their cost, community-demanded heritage services. Such a system creates perverse incentives for some owners of heritage properties. A more effective, efficient and equitable system would be achieved through promoting willing conservation volunteers rather than conscripts. For many property owners the costs from heritage listing are not unreasonable or unacceptable, but a rebalancing of responsibilities is needed for those owners who face unreasonable costs.

The Commission recommends the adoption of an additional ground for appeal against listing for non-government property owners, namely unreasonable costs. Prima facie, unreasonable costs include forgone development opportunities, substantial reduction in market value due to listing and maintenance costs that cause an unjustifiable financial hardship. For these properties, governments would need to negotiate a conservation agreement, if they wish to heritage list the properties.

The rationale for government intervention in heritage conservation rests on the view that owners, acting in their own interests, would conserve too little historic heritage. This was examined in chapter 6 and the Commission concluded that there is a prima facie case for government intervention in historic heritage conservation.

Governments have intervened by introducing regulatory regimes based on the identification of places with heritage characteristics and the subsequent provision of statutory protection through their inclusion on lists of protected places. This protection places a range of obligations on owners, essentially requiring them to undertake no action which would threaten those characteristics unless approved by the relevant authority.

At present, the decision to heritage list a property, and thereby impose statutory restrictions on its use and development, is on the sole basis of its heritage values. While provisions exist to consider any resultant costs imposed on the owner (and occupier), owners have no rights to insist that this is done. Typically cost

considerations are irrelevant for the decision to list. As a consequence, the current heritage system, while involving some support from governments in some circumstances, essentially requires property owners to provide, without payment, community-demanded heritage conservation services.

As outlined in chapter 7, this approach entrenches divergences between the incentives faced by owners and the community, and introduces incentives to list and conserve historic heritage places where the benefits are less than the costs of conservation. It also provides an incentive for listing agencies to continue to press for further conservation effort until there are few more benefits to be had — irrespective of the costs involved. Without the discipline imposed by having to pay the costs of heritage conservation, there may be over-provision of the heritage public good, or of particular types of heritage places, resulting in a net cost to the community as a whole, rather than a net benefit.

In some ways this can be seen as governments ‘over correcting’ for the perceived under-conservation of heritage places that would occur in an unregulated situation.

The disconnect between the incentives facing heritage property owners and those of the listing agencies (as representatives of the wider community) has created a reservoir of hostility for some towards heritage conservation and its administration — hostility on the part of the very people society is expecting to actively conserve those heritage places. While financial and other forms of assistance are available to owners, they are modest and not systematically related to the costs imposed by listing and therefore, do not act as a discipline on the range and level of heritage places protected.

This is a growing problem as the number of listed places has increased considerably, particularly at the local level, and as listed heritage places are increasingly privately-owned properties in daily use. In addition, listing has progressively moved beyond the protection of recognised and accepted iconic buildings to cover a much wider range of places of interest to those knowledgeable in the field, but less well understood by the wider community. Here, the need to make a judgment on the benefits and costs for the wider community becomes much more important, particularly if the cost imposed on owners is significant.

9.1 A better balance between public and private responsibilities is needed

The views of participants adversely affected by heritage listing were not primarily against the need to recognise and protect historic heritage places — that is, the

heritage conservation objective. Rather, the arguments focused on the effects of the current statutory system of heritage protection — that is, the mechanisms used to achieve the objective. Participants disagreed with the heritage assessment of their property, or complained about the costs imposed by listing, or both. For example, one owner told the Commission that he felt ‘honoured’ that his house was proposed for heritage listing, but the costs and restrictions imposed by the statutory system did not make heritage listing attractive (DR trans., p. 145).

The distinction between the heritage conservation objective and the mechanisms for achieving that objective is important to better understand and address the problems in the current heritage system.

Many participants, from both the private sector and in government, recognised the need for a better balance between the roles and responsibilities of private owners and the community. For example, the Tasmanian Government commented that:

There needs to be a better balance between the essential statutory and regulatory approaches and more active engagement with the public and owners in particular to inform, educate and support them in a practical sense. ...

Unless owners are well-informed, educated and supported, through both practical and financial assistance, it is likely that the risk of damage to, or loss of, heritage will continue, as listing alone does very little to protect or conserve heritage. (sub. 136, pp. 14–5)

Better balance was often described as the implementation of mechanisms that engage owners of heritage places as willing volunteers, rather than as reluctant conscripts. The Commission believes that a system which encourages owners of heritage places to volunteer for listing would more effectively achieve the heritage objective compared to a system of compulsory listing. A system based on compulsion may create perverse incentives for owners to conceal, damage or degrade heritage properties. This sentiment was supported by the Australian Council of National Trusts (sub. DR237, p. 83). The New South Wales Heritage Office commented that:

Obviously, we’d think that a place that you list with the owners being happy with that concept is a much better outcome. (trans., p. 880)

Another key question — in addition to the arguments that a system that promotes willing volunteers would better achieve the heritage conservation objectives — is whether it is reasonable (fair or ethical) for the wider community to seek a benefit for itself and then expect one particular (very small) group within that society to carry the primary burden of the cost of providing that benefit.

Councillor Green from Rockdale Council in New South Wales submitted that:

It is fundamentally inequitable ... to expect individuals to shoulder the burden alone for the benefit of the community alone. There is no question that most of our genuine heritage items must be preserved. Yet if heritage is a community good which justifies an override of private property rights, then surely the cost should be borne by the community. (sub. DR199, p. 1)

Similarly, Peter Jensen, a town planning consultant from South Australia said:

... I support your push to get greater equity in the system through the wider community contributing to heritage conservation. I acknowledge that the one big weakness – you've mentioned others, and I'm sure there are others – is the lack of community contribution to heritage conservation at the individual level. (DR trans., p. 349)

The current system of heritage listing needs to be rebalanced so as to ensure that the full effects of listing (including both private and social costs and benefits) are taken into account by decision makers. A system that places the cost of conserving places (for the benefit of the community) primarily onto individual property owners does not result in effective, efficient or equitable conservation outcomes:

- there is little incentive for the owner to be positively engaged in conservation, unless they individually place a high value on such characteristics;
- the relationship is inherently adversarial, with a constant incentive for the owner to seek to avoid or overcome such obligations; and
- at the same time, because the rest of community is essentially obtaining their desired heritage values for 'free', the demand for such conservation is essentially unconstrained.

This does not mean that the current system has become unworkable. In many cases, if not most, the costs imposed on owners are minor and the divergence between private and community willingness to conserve is not significant. However, where the cost is high, the current system does not cope well — other than by becoming increasingly arbitrary, adversarial and authoritarian in the face of owner discontent and resistance.

When this occurs, owners have few options as the system frequently fails by considering only one side of the equation — the heritage characteristics of the property in question. In saying that, however, some State Heritage Offices consider

economic hardship, or reasonable use of the place, when deciding to list (see, for example, NSW Heritage Office). Such processes are not typically replicated at the local government level.

9.2 Changing the balance

Achieving a better balance will not be an easy task, particularly if it involves significant change to the way the current heritage protection regime operates, and if it involves a significant shift in the balance of funding for conservation — from the private to the public sector.

There are two essential elements for getting a better balance of incentives, both for those choosing which heritage places should be protected and conserved, and for those responsible for undertaking that conservation. These elements are:

- allocating the costs appropriately — the beneficiary pays principle — so that there is an incentive to actively conserve, rather than resist the process of listing and protection; and
- including the costs as well as benefits in the process of deciding which heritage places to protect and conserve. This is to ensure that resources are not wasted on the conservation of places with low heritage values, compared to the cost of their conservation.

These two elements underpin the options for change discussed below. Unless these fundamental matters are addressed and included, any change to the existing arrangements will be essentially arbitrary; are unlikely to be more efficient as the underlying incentives will remain flawed; and unlikely to be effective unless considerable resources are used fighting against the conflicting pressures inherent in the current arrangements.

Increased effort and resources in a situation where the fundamental incentives are inappropriate may only make things worse rather than better by adding to community costs while providing only marginal heritage benefits for the community. A soundly-based system with the right incentives is more likely to be capable of continuing to be robust in the face of changes in the pressures on heritage places and in response to the evolving nature of the community's judgments about heritage values.

9.3 A role for the community to purchase heritage conservation

If heritage listing substantially restricts current or potential use of a private property, or imposes additional costs that would not otherwise be incurred, then the wider community should be prepared to bear the financial consequences of its decision to list, rather than leaving all additional costs to the owner. This assessment is not

based on some notion of fairness (although perceived fairness is not irrelevant when owners are being required to provide the heritage services demanded by the wider community). Rather, it is based on achieving the outcomes that society desires from private property as efficiently as possible. This requires:

- clear specification of the heritage outcomes sought; and
- the ongoing cooperation, knowledge and effort of owners, who ultimately must deliver those outcomes through the conservation of their heritage properties.

This would involve public funding of heritage conservation that would not otherwise be undertaken through private activity, but which the community values. Having governments buy the extra heritage services that the community demands (including, in some more extreme cases, purchasing properties) would mimic private, voluntary transactions driven by the prospect of gains from trade accruing to both parties.

Acknowledgement and provision of community funding of the additional costs associated with heritage listing and protection would have three key beneficial effects:

- First, owners will be willing partners in conservation and thus the current pressures to degrade heritage values over time, or pre-emptively, will be reduced. Contract terms and conditions associated with public funding can be designed to provide certainty to owners and provide positive incentives for them to retain and manage heritage properties in the long term. For the owner, heritage characteristics would become an asset rather than a liability.
- Second, it will provide an important incentive for the wider community to consider the balance between the benefits and the costs of conservation when deciding on the extent of heritage conservation that should occur. A requirement to pay will place some discipline on the community's 'demand' for heritage services.
- Third, it would compel prioritisation of conservation demands, focussing attention on areas where the community benefits are likely to be the greatest in

comparison to the costs involved, such as areas which are currently poorly represented in the stock of conserved heritage places — a rebalancing of community's 'portfolio' of protected historic heritage places.

Purchasing conservation — examples from other areas

In the nature conservation area, the purchase of conservation services has been trialled in a number of jurisdictions. The Commission, in its 2004 report on the *Impacts of Native Vegetation and Biodiversity Regulation*, commented that:

Contracts with landholders for the provision of conservation services represent the dominant policy instrument in most OECD countries with contract coverage reaching 20 per cent of European Union farmland (OECD 2003). However, this option remains relatively unexplored in Australia. The ACF considered that:

- ... stewardship payments can have a role to play ... where (for example) very high cost management is necessary, entailing little if any private return, to retain the presence of very high conservation values. (PC 2004a, p. 204)

The Native Vegetation Report (PC 2004a, p. 205) also referred to the following payment systems:

- fixed rate payment for a standard service: an approach used often in agri-environmental schemes in the EU (for example, Environmentally Sensitive Areas in the UK);
- individually negotiated agreements used in the Private Forest Reserve Program in Tasmania; and
- conservation auctions used extensively in the United States where the Conservation Reserve Program (CRP) has been operating since 1985. The BushTender trial in Victoria is another example of a conservation auction scheme.

In regard to the similarities between native vegetation conservation and the challenges facing the conservation of historic heritage places, the Australian Council of National Trusts said:

There have been differences of opinion about the similarity of economic issues between natural and historic heritage, although clearly the core issues are the same (in particular, how to value the external benefits). It may even be possible to argue that the problems are more challenging with historic heritage because there may be some possibility of regrowth of native vegetation or preservation of an equivalent natural site elsewhere, whereas heritage preservation relates only to the individual asset that, once gone, cannot be replaced. However, in both cases, the main issue for economists is how the market can operate when much of the value accrues to external parties. (sub. 40, p. 10)

Contracting to achieve certain conservation objectives in the natural heritage area is not restricted to governments. For example, several schemes, such as Land for Wildlife and Trust for Nature (box 9.1) help landholders voluntarily maintain native vegetation on their properties.

Similarly, the Commission (PC 2004a, p. 205) reported that WWF Australia said that it was ‘heavily involved in testing some of the market instruments’ and that it was willing to bring in money to pay for environmental outcomes in a trial conservation auction in the Liverpool Plains (New South Wales). That trial has apparently proved to be very successful.¹

Box 9.1 Land for Wildlife and Trust for Nature (Victoria)

For over 20 years, Land for Wildlife has supported landholders providing wildlife habitat on their properties. The scheme offers help with property assessments but does not provide financial incentives to encourage conservation. The scheme establishes voluntary, non-binding agreements with landholders to manage land for biodiversity conservation. In Victoria over 4900 properties, covering more than 125 000 hectares of habitat, are involved. The scheme also provides extension and education services, emphasising the practical benefits of nature conservation to landholders.

Trust for Nature runs a conservation covenant program. Landholders place permanent covenants on parts of their land to protect it from clearing or other activities. Covenants are entered into voluntarily, but are legally binding on current and future owners of the land. Trust for Nature does not offer financial incentives to landholders for adopting a covenant, other than covering the legal costs of registering the covenant (around \$3500 per property). Legal costs are covered by a Stewardship Fund, which is partially community funded. Once a covenant is registered, a Trust for Nature representative meets with the landholder to discuss future management actions and periodically visits the landholder to assess the condition of the environment on the covenanted land, the potential threats to species on the land, and to review the landholder’s management actions in order to recommend future management guidelines.

Currently 500 covenants are registered, protecting over 20 000 hectares of largely threatened habitat on working farms, lifestyle ‘bush blocks’ and on rural/urban fringe properties. A further 300 covenants, representing another 15 000 hectares, have been approved by the Board of Trust for Nature and are awaiting final registration. Trust for Nature estimates that covenanters provide approximately \$1 million of in-kind management of habitat across Victoria per year; approximately \$150 million worth of property that would otherwise have to be purchased on the open market; and advice to other landholders on the need for nature conservation on private land.

Sources: Productivity Commission (2004a), p. 187.

¹ http://www.wwf.org.au/About_WWF_Australia/How_we_work/In_the_field/South-east/landscape_auctions.php.

Purchasing heritage conservation through negotiation

Such means of providing assistance or contracting with private property owners does not seem to be a feature of historic heritage conservation in Australia. While heritage legislation in all Australian jurisdictions includes provision to negotiate heritage agreements with property owners, they have very rarely been used. In part, this is because they are typically reserved for specific types of properties and the disposal of government assets. It can also be explained by the lack of any pressure to enter into such agreements after listing, with its obligations and restrictions on owners, has already occurred. Those seeking conservation have achieved the essential objective without the need to enter into any agreement with the owner, and there is subsequently little incentive to do so.

In the area of private funding and management, organisations such as the National Trust have owned and managed properties themselves, or lobbied government to buy or regulate other properties. They have not generally seen their role as one of providing assistance to other private owners. In part, this may reflect the shortage of funds that National Trusts face for the management of their own properties — National Trusts were characterised in submissions as being asset rich and cash poor.

This is not the case elsewhere. Some other countries have made much greater use of agreements between government and owners to conserve and manage heritage properties.

Conserving heritage in the United States

The United States system of heritage listing at the National and State level provides formal recognition for places of heritage significance, but carries no regulatory implications.

Local governments have the power to list and regulate heritage properties through heritage ordinances. However, the arrangements in each municipality are far from uniform. For example, in the State of Colorado, more than half of local governments require consent from the owner to list their property (a system of voluntary listing). A further 13 per cent of local governments require a higher standard to be met if they want to list a property without owner consent — for example, the place must be of ‘overwhelming’ heritage significance.

Many governments in the United States rely on conservation covenants or ‘easements’ and other financial incentives such as tax deductions and grants to achieve heritage conservation objectives.

A conservation easement is a voluntary contractual agreement between a property owner and an eligible organisation (government agency or NGO) to protect a significant historic property, landscape or archaeological site. In general, an owner agrees to conserve a place and seek approval for alterations, in exchange for an income tax deduction (equivalent to the loss of property value from the restrictions in the easement). Easements are often tailored to protect the individual characteristics of each heritage property, although most government agencies and NGOs use a standardised template agreement as a basis for negotiation. A sample easement is provided in appendix E.

Easements have been a long standing feature of heritage conservation in the United States. They are used in every State to protect natural and cultural heritage. While there is no comprehensive list of historic heritage easements in the United States, their usage is widespread and number in the thousands. By way of example, the use of easements to preserve natural heritage is extensive — by 2003, over 17 500 easements were in place, protecting over 5 million acres of land (Byers and Ponte 2005, p. 8).

These negotiated easements seem to have general support from government and heritage advocates (box 9.2).

Box 9.2 Views on conservation easements

The National Trust (US):

Preservation easements are a uniquely effective preservation tool — a tool that uses *private* — and *voluntary* — agreements to protect historic structures and significant historic areas from demolition or inappropriate alteration. For well over three decades, hundreds of non-profit organizations — and governmental agencies at the federal, state, and local levels — have responsibly used preservation easements to protect many thousands of historic structures, archaeological sites, battlefields, and rural landscapes. For many of these properties, easements serve as the only legal protection to preserve their historic or architectural values.

Rand Wentworth, President of the Land Trust Alliance, speaking on easements for natural conservation, said:

The great conservation opportunities of the next century will be on privately owned land, and conservation easements are the most effective way to protect those lands. Landowners like conservation easements because they are a refreshing alternative to government regulation: they are voluntary, local and respect private property rights. For the many people who love their land, it is the best way to ensure that it is preserved for all time.

Richard A. Epstein, University of Chicago:

Voluntary easements call for intelligent private monitoring and upkeep in the way in which no system of pure state designation can hope to match. The system works on win/win relationships. It leads people to think of innovative ways in which to shape easement, preserve façades, swap plots of land, make interior design alterations and the like. It works to save and rehabilitate far more properties than many efforts at designation. There is no question that the public subsidy from tax deductions drives the use of many of these devices, but that is defensible in sight of the positive externalities that are created by many preservation efforts. The plea here is general. Concentrate on the things that one does well in preservation. Here, as in other areas of life, cooperation beats coercion.

Source: National Trust (2005); Byers & Ponte (2005); Epstein (2003).

Conserving heritage in Canada

The United States is not the only jurisdiction to rely on negotiation with property owners. At the provincial level in Canada, both Ontario and British Columbia provide for, and extensively use, negotiated conservation agreements.

Although Ontario has a statutory heritage list as its primary mechanism for the protection of heritage places, it promotes the use of voluntary conservation agreements, particularly at the local government level. Under the Ontario Heritage Act, councils can pass by-laws entering into covenants with heritage property owners. The Ontario Government observed that:

Heritage easement agreements, also known as heritage conservation agreements are the most effective way for municipalities to protect their most valuable heritage resources.

Easement agreements set out requirements for maintaining a property or specific heritage features of a property. The agreement is registered on the title to the property and is binding on future owners. (Ministry of Culture 2005, p. 16)

Similarly, the Ontario Heritage Foundation argued that easements are a superior conservation tool compared with listing (designation):

A conservation easement is stronger, more comprehensive and more flexible than a designation. It is a private agreement registered on title to a heritage property. It ensures that the heritage property is prudently maintained and adequately insured. It also ensures adequate demolition control. And an easement can be tailor-made to suit the unique heritage character of the resource it protects. (Ontario Heritage Trust 2006)

Ministry of Culture has developed a template heritage agreement (see appendix E). Ontario currently has around 460 easements.

The system of heritage conservation in British Columbia is essentially based on statutory listing, but with a number of key differences to the existing system in Australia:

- a statutory right to compensation if listing reduces the value of a property;
- a set of conservation principles that recognise private property rights and seek to balance private rights and public benefit;
- a commitment to provide financial incentives for conservation; and
- a commitment to conservation by agreement with the property owner.

The Heritage Conservation Act 1996 states that the government must compensate an owner for any reduction in market value attributable to listing (designation). The amount of compensation may be determined by agreement of the owner and the local government, or, if they are unable to agree, by binding arbitration under the Commercial Arbitration Act 1986.

Despite the right to compensation, it appears that there have been very few, if any, claims for compensation. Since designation does impose significant costs on some property owners, this may suggest that governments are listing very few properties or that the administrative costs of seeking compensation are high. However, information from the Heritage Branch of the Ministry of Tourism, Sport and the Arts indicate that this is not the case. Rather, it appears that the right to compensation places a discipline on State and local governments to achieve conservation goals through agreement, or at least cooperatively, rather than solely through regulatory ‘taking’.

FINDING 9.1

Negotiated conservation agreements are central to the heritage conservation system in some comparable overseas jurisdictions. Rather than being seen as a burden, negotiated conservation agreements are regarded as being superior than non-negotiated statutory listing in some jurisdictions.

9.4 Targeting government involvement to achieve the greatest conservation benefit

In the draft of this report, released for public comment, the Commission recommended that governments, at all levels, should only impose statutory controls over individual heritage places after negotiating conservation agreements with the property owner. Negotiated conservation agreements would address the problems identified in the current system through rebalancing the imposition of costs for conservation from individuals to the community. The use of negotiated conservation agreements was supported by all participants who had been adversely affected by heritage listing. For example, Bill Frew commented:

As owners of property heritage-listed after we purchased it, we wholeheartedly endorse the Productivity Commission's draft recommendation 9.5 [use of negotiated conservation agreements]. (sub. DR401, p. 3)

Many participants, including local governments, supported the principle of negotiated conservation agreements. For example, both Campbelltown City Council (sub. DR371) and Ku-ring-gai City Council (sub. DR351) supported using negotiated conservation agreements so long as negotiations were not prohibitively costly. Ku-ring-gai Council noted:

Idealistically the concept of properties entering into a negotiated conservation agreement could provide for an effective heritage management system, however, in reality there are many obstacles that would prevent this form of management from being successful. (sub. DR351, p. 1)

Under the current heritage systems, the incidence of the costs of conserving historic heritage for the community's benefit falls onto owners of heritage places (be it either government or private) — irrespective of the size of the cost. While all property owners incur the cost of conservation, not all owners face the same burden. For example, heritage listing may restrict development, but property owners would not face a significant opportunity cost where development may have not been allowed under the zoning of the land. In other cases, owners may be willing to incur costs (including forgone development) because they receive personal benefits from owning, occupying and maintaining a heritage property.

There appear to be two categories of heritage owners: those who face disproportionately, or unreasonably, high costs of conservation; and those that face reasonable costs and/or are happy to undertake conservation. In response to the draft report, Australia ICOMOS noted that the proposed use of negotiated conservation agreements for all heritage properties did not appreciate this distinction:

I suppose one of the strong recommendations we would make to the Commission is, you've come up with one model [in the draft report], might there be some other models such as targeting the use of voluntary conservation agreements with additional grant funding or some sort of assistance to achieve better conservation for the problem [places]. (DR trans., p. 597)

As outlined in chapter 6, it is appropriate for the community to pay for the extra heritage benefits where it involves added costs to private owners. David Logan, a heritage architect and member of the NSW Heritage Council, commented in response to the draft report:

In relation to conservation agreements, I think that is also an excellent idea arising from the draft report. However, I don't think it is necessary to have conservation agreements for every place that's proposed for listing. The ones I do think would benefit from a conservation agreement are the ones where development potential is forgone as a result of listing. In those cases ... a conservation agreement I think is probably both beneficial and, arguably, necessary. (DR trans., p. 88)

This has implications for a system based on negotiated conservation agreements — the Commission's aim is to maximise the net benefit of the new system. Rather than applying negotiated conservation agreements to all private owners of properties, these agreements should focus on private owners that currently face unreasonable costs of conservation and hence, are not able to supply community beneficial heritage services. Such an approach would be likely to enhance the efficiency of the heritage conservation system.

In addition to suggesting the targeting of negotiated conservation agreements, participants informed the Commission of the likely high cost of implementation (including high negotiation and administrative costs).

The Commission, in the draft report, noted that parties who are happy to conserve would willingly sign negotiated conservation agreements — and these would be entered into without the need for extensive negotiation or payment. Only those that face unreasonable costs, and hence are opposed to listing, would require extensive negotiation.

However, in response to the Draft Report, many participants submitted that negotiation would be costly for the majority of people not adversely affected by listing. That is, several participants argued that even though the majority accepted

heritage listing, and listing did not impose unreasonable costs, property owners would not volunteer their house for listing. David Logan commented:

... owners generally won't agree, for the reasons that I've mentioned. People don't want to be controlled. Even if you say to them, "Look, we'll cover you for all your financial burden, we'll cover that, will you agree to be listed then?", the answer will still be no in the vast majority of cases. Once they're listed, it's fine. They realise that in fact there is no major detriment associated with the listing. But it's the fear of the unknown that would cause them to say no, in the same way that the fear of the unknown would cause them to say, "Well, we'd rather not have a zoning control, we'd rather not have a height control". (DR trans., pp. 95–6)

Participants also argued that a system of negotiated conservation agreements for all heritage places would:

- represent a radical change in the way heritage conservation was undertaken in Australia;
- involve potentially high costs in negotiating new agreements and converting existing listings to agreements;
- involve potentially significant and immediate pressure on funding resources; and
- introduce the potential for a major reduction in the number of listed and protected places if the resources were not made available to fund the extensive use of conservation agreements.

Some participants (e.g., DEH sub. 304) submitted that negotiated conservation agreements would incur transaction costs greater than the benefits to be gained from negotiation. However, the Commission believes that some submissions have significantly overstated the likely transaction costs. Transaction costs would be reduced through the use of template agreements (as used in other countries) and the willingness of some property owners to agree to heritage listing. In saying that, however, even if the transaction costs are modest, the mandated use of negotiated agreements may not be justified for all properties.

The Commission is mindful of the degree of change that would be entailed by a move to conservation agreements for all listed properties. Thus, the Commission considers that conservation agreements should be targeted to cases where heritage listing would involve an unreasonable cost for the owner.

FINDING 9.2

Negotiated conservation agreements should be targeted and used where the imposition of heritage controls would impose unreasonable costs on the non-government owner of the heritage property.

9.5 Unreasonable cost appeal

The current system of statutory heritage listing affects property owners to different degrees. Many property owners are happy and honoured to own and maintain a heritage property. Often these owners buy the property with knowledge of its heritage, or have agreed that their property be heritage listed. However, there are a significant number of property owners who are not happy with, or do not agree to, the heritage listing of their property. These owners typically do not agree to the heritage assessment of their property, or heritage listing imposes unreasonably high costs on them.

As discussed above, any reform to the current system of heritage listing should be targeted to the property owners who incur high costs for the provision of a community benefit. It is this group that would benefit the most from negotiated conservation agreements.

The size of this group is open to debate. Participants' comments to the Commission on the level of dissatisfaction with their property being listed ranged from 25 per cent of owners to 1–2 per cent. The actual proportion does not matter, so long as the system is able to ensure that those owners who unreasonably bear the cost of providing heritage services to the community can receive adequate financial assistance from the community.

This can be achieved by the introduction a right of appeal against heritage listing on the grounds that it would impose 'unreasonable costs'. An 'unreasonable costs' clause would provide an additional basis for property owners to appeal the decision to heritage list their property (either by State Heritage Office or local council).

A number of property owners informed the Commission about the costs they incur as a result of heritage listing. These typically are:

- cost of forgone development opportunity (including decreased land value even where the owner is not planning to develop);
- increased maintenance costs; and
- additional red-tape burden.

For example, Councillor Gary Green told the Commission:

Recently my retired parents had their only investment property heritage listed by COS [city of Sydney] against their will and without any compensation. The forced listing of my parents' property is consequential ex-appropriation of their property rights has cost them their life savings in foregone development revenue. It's also cost them tens of thousands of dollars in DA [development application] application fees to be directly lost too. As such, it's worse than unfair and is actually theft when heritage restrictions

are forced upon unwitting owners years after purchase, which is what happened in my elderly parents' case. (DR trans., p. 26)

Saman Rahmani also said that heritage listing would have serious consequences for the value of his property:

I have engaged an independent property valuer to value my property with a heritage listing and without. This valuation indicates that if this property gets a heritage listing its value will drop by \$170,000. This is a very substantial drop. (DR trans., p. 39)

The Uniting Church of Australia commented on the effect the cost of maintenance has on conserving its historic churches:

It is undeniable that a key pressure on the conservation of heritage places is the cost of their maintenance and upkeep. Given that many of the historic buildings protected under national, State or local government legislation are old (dating from the mid 19th century onwards) even basic repairs and maintenance costs can be prohibitive. (sub. 76, p. 7)

In addition to aggrieved property owners, several other participants also informed the Commission about costs, which they regard as being unreasonable. For example, David Logan said:

... you have, I think, very correctly identified the two most commonly perceived impediments resulting from heritage listing. Those are the perceived burden that owners suffer as a result of the need for heritage impact statements and the need to engage a heritage architect; that's the first burden. In the vast majority of cases there is no second burden, and the second burden is as you've identified yourselves, the loss of development potential resulting from a heritage listing, particularly on sites – as you again have said – where the zoning would allow a greater level of development than currently exists on the site. (DR trans., p. 93)

Reasonableness tests in other areas

Terms like unreasonable and reasonable are already used in a number of regulations. There are also many judicial decisions interpreting and applying these terms. The use of these terms in other regulation and court cases provides guidance on how an 'unreasonable costs' appeal could be used within heritage legislation.

Reasonableness or unreasonableness is used in the following areas:

- Disability Discrimination Act (DDA);
- the Environment Protection and Biodiversity Conservation Act
- telecommunication access regime under the Trade Practices Act;
- Corporations Act; and

-
- occupational health and safety; and

Reasonableness under the Disability Discrimination Act

The DDA contains many references to reasonable and unreasonable. Examples of reasonableness tests include :

- Indirect discrimination occurs when a general action ‘that is not *reasonable*, having regard to the circumstances of the case’ (s. 6).
- Similarly, it is not ‘unlawful to do an act that is *reasonably* intended’ to provide goods and services to meet their special needs (s. 45).
- In relation to the requirement to make adjustments for the disabled, the DDA limits action to the level at which they would impose ‘unjustifiable hardship’ on the provider (s. 15(4)).

The DDA requires that businesses undertake ‘reasonable adjustments’ in order to provide services for disability access. This is similar to the requirement for private firms and individuals to provide for heritage conservation. Both disability access and heritage conservation provide benefits to the community (positive externalities), and both impose costs that are not borne by the community.

The Commission, in its 2004 review of the DDA, commented that:

The DDA does not define ‘reasonable’ for the purposes of indirect discrimination. However, reasonableness is a well-established legal concept. (PC 2004b, p. 49)

The Commission recommended in its DDA review that the Act be amended to include a general duty to make a reasonable adjustment, and that reasonable adjustments should be defined to exclude adjustment that would cause unjustifiable hardships (PC 2004b, p. 196).

The Commission also looked at who should pay for the cost of meeting obligations under the DDA — obligations that provide a community benefit (box 9.3):

It has been presumed until now that the organisation that is required to make the adjustments, pays for the adjustment. But this might not be the most equitable or efficient arrangement. Furthermore, if the organisation concerned can prove that it cannot afford the adjustment, the community might have to forgo otherwise worthwhile opportunities. (PC 2004b, p. 215)

Box 9.3 **Who should pay: Disability Discrimination Act**

Stein (2003) provides a formal framework within which to compare the costs and benefits of workplace adjustments, and to decide which adjustments should be: funded by employers; funded by taxpayers; or not be undertaken. Stein identifies a range of possible adjustments, ranging from wholly efficient to wholly inefficient, depending on the ratio of quantifiable costs to benefits (box 8.4). From Stein's analysis, a clear delineation of adjustment funding responsibilities emerges.

In essence, Stein's funding rule is that employers should pay for any adjustments that allow them to maximise profit. This rule applies even in cases where disability discrimination legislation is required to show employers that they would benefit from employing and/or accommodating a person with a disability (see chapter 7).

More controversially, Stein argues that employers should be made to pay for adjustments that, while benefiting them in absolute terms, do not benefit them as much as the alternative of employing a person without a disability who needs no adjustments (example 2a in box 8.4). Stein argues that such adjustments therefore 'extract a differential cost from employers' (2003, p. 143).

Finally, when employers stand to gain no net benefit — or risk incurring a loss — from employing/accommodating a person with a disability, two possibilities arise.

- If hiring and/or accommodating produces a net social benefit, then employment should go ahead, with adjustments to be funded by government. To impose this cost on the employer would be unreasonable.
- If employment of a person with a disability would result in a net social loss, then employment should be discouraged and replaced with social security benefits (Stein 2003, pp. 176–77).

Source: Productivity Commission (2004b), p. 222.

With respect to the provision of community beneficial adjustments, the Commission identified the situation where the social benefits exceed the social costs of adjustment (similar to heritage where the social benefits exceed the social costs of conservation), but the private benefit to the employer is not high enough to justify expenditure on the adjustment. The Commission commented:

Under the Commission's revised unjustifiable hardship defence, these adjustments would pass the first hurdle of providing a net social benefit. Using Stein's approach, some of these adjustments would be funded by the employer and some by the community. (PC 2004b, p. 224)

The Commission concluded that:

... it is appropriate for governments to play a major role in funding adjustments in the workplace and elsewhere. This would serve to increase efficiency, equity and the opportunities for people with disabilities to participate as equals in society.' (PC 2004b, p. 230)

Similar to disability access, heritage conservation can provide a net social benefit. However, in some cases both access and conservation may provide a net social benefit, and yet be uneconomical for a private individual or company to undertake it. The DDA requires that private firms must undertake reasonable adjustments in order to provide disability access. Where access can only be provided through unreasonable adjustments, the Commission (2004b) argued that there is a role for government to assist in making the adjustments. There is no such provision in heritage legislation. That is, heritage legislation currently requires private individuals or firms to undertake conservation of all heritage places, irrespective of whether the cost imposed is reasonable or unreasonable.

Unreasonable exemption in the Environment Protection and Biodiversity Conservation Act

The Environment Protection and Biodiversity Conservation Act provides that all Australian Government departments and agencies must not sell assets that have either Commonwealth Heritage or National Heritage values unless the contract for sale contains covenants protecting these values.

This requirement is subject to two exceptions. First, inclusion of a covenant is impracticable; and second, having regard to other means of protecting those values, including such a covenant in the contract is unnecessary to protect them or is unreasonable (ss. 341ZE and 324ZA).

Reasonableness in other areas

Under Part XIC of the Trade Practice Act (telecommunication access regime), the determination of whether an action encourages the efficient use of infrastructure must have regard to 'whether the costs that would be involved in supplying and charging for, the services are reasonable' (s. 152AB(2)(e)). The Act provides further matters that must be considered in deciding whether particular terms and conditions are reasonable.

The Corporations Act allows exemptions for specific orders where the making of such orders would impose an 'unreasonable burden' on a company (s. 343). The Act also provides guidance on what the Australian Securities and Investment Commission (ASIC) is to have regard to when determining whether an order would impose an unreasonable burden. These include the expected compliance cost of the firm; the expected benefit of compliance; and any practical difficulties likely to be faced.

Reasonableness is also a factor under occupational health and safety regulation:

The duties of care imposed by the OHS [Occupational Health and Safety] legislation are either subject to, or have an available defence relating to, what is ‘practicable’ or ‘reasonably practicable’. That is, the prosecution must prove that the duty holder failed to do all that was reasonably practicable to avoid the risk to health and safety, or (as in New South Wales) a duty holder can avoid conviction for a strict liability offence by proving a defence that it did what was “reasonably practicable”. (CCH 2003, Australian Master OHS and Environment Guide, 2003, p. 121)

The introduction of an ‘unreasonable costs’ clause into heritage legislation would enable effective, efficient and equitable conservation outcomes — and would be consistent with the approach taken to the provision of community services by private individuals and businesses in other areas.

What would constitute ‘unreasonable costs’ of heritage listing?

The term ‘unreasonable costs’ should be interpreted so that its implementation gives effect to the issues addressed in section 9.2. Ultimately tribunals and courts would decide on what constitutes unreasonable costs when hearing appeals against listing. However, governments should provide guidance in legislation so as to ensure that the policy intent is implemented.

The Commission believes that the following should be observed when interpreting unreasonable costs.

First, the costs being assessed are the additional private costs incurred by the property owner to conserve the specified heritage attributes. The heritage identification process (i.e., the identification of heritage significance prior to the decision to list) assessed the heritage significance of the place and the benefits of heritage protection. Therefore, the assessment of heritage conservation benefits has already been undertaken prior to the use of an ‘unreasonable costs’ clause. The consideration of cost would complete a benefit–cost analysis for the property where listed is proposed and opposed .

Further, the additional private costs of heritage listing should not include the costs normally incurred by non-listed properties in the same zone (including restrictions on development faced by all properties in that zone). After all, the relevant question is how *more* costly is it to conserve the property given the allowed development in that zone. The assessment should also consider the cost of any potential reconstruction or remedial maintenance work due to restrictions on demolition — that is, would keeping a dilapidated heritage property impose an unreasonable cost on its owner.

Second, as far as practicable, any finding of unreasonable costs should not be dependent on the financial status of the current owner. The financial status of the owner is irrelevant when considering whether the private ‘burden’ of providing a community demanded service requires government assistance. The unreasonable costs clause provides a brake for governments’ demand of private heritage services — so governments can consider whether the conservation value of the heritage service justifies the cost impost. In saying that, however, at the margin, this may be difficult to achieve.

The Commission proposes that the consideration of ‘unreasonable costs’ should include:

- The value of opportunities forgone as a result of the listing, for example:
 - development opportunities lost;
 - decrease in the capital value of the land; and
 - consequences of forgone options to improve ‘liveability’ or ‘usability’, as a result of restrictions on modification or adaptation to current owner use and enjoyment.
- The additional maintenance and repair costs imposed to maintain the heritage-specific characteristics.

Participants identified both of these costs (forgone development opportunities and increased maintenance costs) as costs that are considered to be ‘unreasonable’ when the burden is solely left to the property owner.

Forgone development opportunities would normally result in the largest cost to property owners, although the number affected may be relatively small. This cost is only incurred where the zoning of the land (if the property were not listed) allows greater development than allowed under heritage restrictions. Many private residential properties are located in single dwelling zones. However, there seems to be an increasing number of properties subject to heritage controls, which otherwise would be zoned for multi-dwelling use. These costs are also high for properties (in both single- and multi-dwelling zones) that contain features which are deemed unsuitable in the modern property market, but cannot be altered or removed due to heritage restrictions.

Including forgone development opportunities as an ‘unreasonable cost’ would, in addition to addressing the private cost impost, help ensure that governments do not use heritage listing for non-heritage planning purposes.

The cost of refurbishing or maintaining a heritage property may also be considered a significant cost impost. While not common, high maintenance costs can impose

significant hardship on owners of heritage properties. This is particularly the case for many rural properties which are no longer used or occupied. Any assessment of unreasonable as regard to maintenance costs would have to have regard to some kind of hardship test (similar to that contained in the DDA for adjustments — see above). Use of terms already in other statutes, and subject to judicial decisions, would facilitate implementation.

RECOMMENDATION 9.1

Australian, State and Territory governments should enable non-government owners of properties to appeal the statutory listing of their property on the additional basis that it imposes an ‘unreasonable costs’. This appeal should be available for non-government owners of all newly listed properties. In addition in relation to currently listed non-government owned properties, it should also be available for those owners of properties that were acquired before the property was statutorily listed.

The following factors establish a prima facie case of unreasonable costs:

- *the zoning of the land permits higher value land use than that allowed under heritage restrictions; or*
- *maintenance, repair or restoration costs required to continue a property’s heritage significance impose an unjustifiable hardship on the owner.*

There are two important intentions of recommendation 9.1 that implementing governments should ensure are carried through into any legislative change. These are:

1. the unreasonable costs appeal should not apply to properties which were already listed when acquired; and
2. use of prima facie factors.

There is an important distinction (recognised by many participants) between property that has been acquired before listing, and property acquired already listed. Property owners that acquire their property after it has been heritage listing, do so with knowledge of its listing and the associated obligations. Such knowledge should be gained through routine title and zoning checks prior to settlement of the purchase. As such, a purchaser who buys property already listed, would have factored in these controls into the price paid — and hence, any added cost from heritage listing (e.g., extra maintenance costs required by the heritage restrictions) should have been reflected in paying a lower capital price than would otherwise be the case. Therefore, any purchaser of property who buys an already listed property would not face unreasonable costs because of the listing.

This can be compared with property owners who purchase a property prior to its heritage listing. When listing occurs after purchase, property owners suffer any financial loss that results from extra restrictions on their land, as well as potentially face higher maintenance costs which they would have been unable to foresee. It is these owners that potentially face unreasonable costs.

In addition, two specific examples of costs imposed by heritage listing were identified, which most participants (including affected owners (DR trans., p. 44), heritage professionals (DR trans., p. 97), and Australia ICOMOS (sub. DR295)) agreed imposed unreasonable costs on private owners of heritage properties. To give effect to the intent of the Commission's recommendation, the court or tribunal should accept that unreasonable costs have been imposed when the two factors identified in recommendation 9.1 occur. However, there may be a small number of cases where unreasonable costs have not been imposed even though one of the two factors is present. In these cases, the burden of proof should fall on the listing agency to show that no unreasonable costs have been imposed — the term 'prima facie' has been used to indicate where the burden of proof should lie.

9.6 Implications for different types of historic heritage

Introducing an 'unreasonable cost' clause into local, State and National heritage systems would affect different types of properties in different ways. The majority of private-owned properties are unlikely to face unreasonable costs and for those places, the current system of heritage listing, conservation and management would be largely unchanged.

This section provides a brief outline of how the Commission anticipates different categories of historic heritage places would be affected by the introduction of a right to appeal listing on the grounds of unreasonable cost. There is, of course, a range of buildings within each category, and the groupings are not necessarily exhaustive. For some, the imposition of heritage listing may be real but trivial, for others it may be large. The consequence of the variety of properties, heritage characteristics and costs is that case-by-case assessment is likely to be necessary for most, if cost-effective conservation is to be achieved.

Residential properties

Located within a low density zone

There are two groups of residential buildings within low density zones. First, dwellings that are readily adaptable to modern living standards and adaptations. Second, those dwellings that are not readily adaptable.

The *first group* are residential buildings, of a size and quality that are readily adaptable to modern living expectations (such things as family room, second bathroom, double garage, etc). If located in an area that is zoned for single residential dwellings, heritage listing is unlikely to impose an unreasonable cost. There is unlikely to be any capital loss, as it is not zoned for medium or high density (multi-unit development). While there may be additional costs associated with maintaining a listed property, most of these would have to be incurred whether listed or not, and owners benefit from the prestige and satisfaction of living in such residences with acknowledged heritage values.

Indeed, if located in an area where a heritage precinct is similarly protected, there may well be an increase in the capital value of the property, because of the greater certainty that the amenity of the setting is better protected.

For many such properties the heritage characteristics are sufficiently of value to the private owner for that owner to undertake the conservation willingly and without any need for assistance. In this situation, the only real 'imposition' on owners would relate to the additional cost imposed by any additional approval processes that result from the heritage listing, or any requirement to prepare conservation management plans, that would otherwise not be required. However, these should not amount to an unreasonable cost.

It is possible that the majority of privately-owned residences that are heritage listed, particularly at the local level, fall into this category. The heritage listing process would proceed largely unaffected by the implementation of recommendation 9.1.

The *second group* are residential buildings of a size and quality that are not readily adaptable to modern living expectations, usually because they are too small (such as miners' cottages or 1950s two bedroom fibro cottages) and/or where modifications to make them attractive for modern living are unlikely to be allowed because they would seriously compromise their heritage characteristics or integrity.

Here, listing does impose a potentially significant cost on owners, and would likely represent an unreasonable cost: first, by limiting their ability to modify the property

to improve their quality of life; and second, by limiting the building's adaptation to modern living, listing also limits its resale market at the expense of the owner.

These almost certainly represent a minority of privately-owned domestic listed buildings, but they are the ones that come to the fore because their listing does impose unreasonable costs on the owner. The implementation of recommendation 9.1 would result in governments being unable to list these properties without first entering into a negotiated conservation agreement with the owner.

Located within a medium or high density zone

Single residential buildings that are located in an area that is zoned for multi-dwelling, medium density, or high density use would typically fit within the definition of unreasonable costs under recommendation 9.1. The protection of the existing residential building precludes significant development opportunities which would otherwise be permissible — resulting in a capital loss to the owners. At the same time, by being located in an area that is becoming medium density or commercial, such buildings are more likely to be 'orphans', and unable to benefit from the joint amenity presented by precinct preservation. For example, the City of Stonnington noted:

The available evidence suggests that some buildings of individual significance (as opposed to those under a broader precinct control) may be less likely to benefit financially from heritage controls. There are suggestions that some property values can suffer where development or subdivisional opportunities are blocked by heritage controls. (sub. 81, p. 4)

Similarly, RE&WK Mews commented:

In the case of properties zoned 2(b) [can be redeveloped for multi-dwellings] (for good reason) there is a very substantial loss of value to the owner without compensation or apology. (sub. 123, p. 2) [emphasis in original]

These are likely to represent a minority of privately-owned domestic listed buildings, but they are the ones that generate the greatest level of debate as their listing does impose unreasonable costs on the owner. Upon implementation of recommendation 9.1, these properties would have access to the unreasonable costs appeal, and would likely succeed. The implementation of recommendation 9.1 would result in governments being unable to list these properties without first entering into a negotiated conservation agreement with the owner.

Commercial properties

One group of commercial buildings are those of a size and useability compatible with their existing zoning, and which are readily adaptable to modern usage. Here, listing may place little imposition on owners, as development potential is not an option because of zoning restrictions. And, as with residential buildings, if located in a commercial precinct which is heritage protected, there may be an increase in the value of the property because of the overall protected amenity of the area.

A sub-set of these buildings are those where the requirement to maintain heritage characteristics (while this may not appreciably limit development opportunities) may impose additional maintenance costs (such as maintaining a slate roof rather than a 'colourbond' roof) in situations where they must compete in the commercial market against other businesses whose properties do not incur such costs (see, for example, Adelaide Arcade (sub. 34) and Marriner Theatres (sub. 161)).

Again, there are additional costs associated with the increased approval procedure requirements. Generally, heritage listing would not impose unreasonable costs on this group and heritage listing, conservation and management would continue as it currently does.

Located within a higher density zone

Another group of commercial buildings are those in areas that are zoned for higher value or higher density use. That is, commercial buildings where their heritage listing precludes their modification or replacement to maximise the value allowed by the zoning (e.g., Queen Victoria Building in Sydney). As with single residential buildings in higher density or commercial zones, owners suffer a loss in the value of their property. This is due to limited development opportunity compared to similar unlisted properties.

This is typically one of the most contentious areas of heritage listing, manifested in the inner commercial areas of most of Australia's cities, as this is typically where commercial buildings with heritage characteristics are located and where the commercial pressures from redevelopment opportunities are the greatest.

In saying that, however, many of the cities affected by this already have in place innovative heritage assistance programs, such as transferable development rights. For example, the City of Sydney (sub. 143) Heritage Floor Space (HFS) scheme allows owners of heritage items to sell a proportion of the unrealised development potential of their site in return for undertaking approved conservation works. The City of Perth (sub. 67) has a similar scheme that enables the Council to offer

incentives to developments involving heritage places by either awarding additional plot ratio to developments or enabling the transfer of unused plot ratio from one site to another.

It would seem likely that under recommendation 9.1, these properties would successfully appeal against heritage listing on the basis of unreasonable costs. However, the impact of having to negotiate conservation agreements may not be onerous as many councils already have innovative and effective assistance programs that offset many of the costs incurred. In fact, one consequence of recommendation 9.1 is to extend to private owners of residences outside the central business district the same type of negotiated agreements as commonly already occur for commercial properties in the central business district.

'Relic' places located in commercial zone

Another group of commercial buildings are those with little or no reuse potential (e.g., a pumping station, gasworks, or old residences). In this situation, the owner is excluded from redeveloping the property, yet is unable to adapt it to another use. Here, listing represents a major burden for the owner, with particularly strong incentives to allow the progressive decay (or even destruction) of heritage characteristics.

It seems likely that such a situation would represent an unreasonable cost, as the maintenance and refurbishment cost would represent an unjustifiable financial hardship on the owner. In addition, it might be the case that the commercial property lies within a zone that allows development, which would not be allowed with heritage listing. Such a situation would also represent an unreasonable cost.

The unreasonable cost clause would force governments to consider whether the heritage values of such commercial properties justify the cost of conservation. The government, or listing agency, would need to negotiate a conservation agreement in order for the property to remain listed.

Rural properties

Another group of heritage properties are buildings in declining areas. This is a particular problem in some rural locations, where farm amalgamations and declining populations can result in redundant heritage-listed buildings which are unlikely to be occupied, or are difficult to occupy. While there are no capital value implications, the requirement to maintain the property which has little use value, represents a burden for the owner. If they are not maintained, they will decay and their heritage values can be irretrievably lost.

These properties probably fall into the category of ‘out-of-sight out-of-mind’. They are left to decay naturally with little effective enforcement because of the obviously unfair imposition that this would place on owners.

In such a case, it would seem likely that a property owner would succeed in an unreasonable cost appeal. Hence, listing would not be possible without agreement of the owner through a negotiated conservation agreement.

Historic sites (including gardens and parks)

An unreasonable cost appeal would, most likely, have little application for historic sites without buildings, gardens and parks, as they are generally zoned for parklands, and/or not privately owned.

However, there could be a few cases (especially with respect to private gardens) where an unreasonable costs appeal could be relevant — for example, a private garden located in multi-dwelling residential zone. In practice though, most owners of heritage gardens are honoured with listing, and do not incur unreasonable maintenance costs, and are unlikely to plan redevelopment (if possible).

Archaeological digs

Archaeological digs, where located within public or unoccupied land would not impose an unreasonable cost. However, there may be cases where an archaeological dig could impose unreasonable costs on private land owners.

For archaeological sites, there is the issue of temporary access to a site for research in situations where the site would be destroyed due to development but where development cannot realistically be precluded. The classic example is finding archaeological items when digging the foundations for a new office tower.

Currently, the cost of delaying completion while archaeological work is being undertaken is borne by the owner (and sometimes the cost of the archaeological research is the responsibility of the owner).

It would be possible to bring this into the proposed system by retaining the right of government to undertake archaeological research if something significant is found, but with the option for the owner to demonstrate unreasonable cost, triggering a negotiated outcome if the research is to continue.

In addition, it is also possible (although rare) that an archaeological dig finds artefacts so important as to justify ongoing digging, or preservation of the dig site.

In such a case, the private owner of the land would face an unreasonable cost due to restrictions on use and development. In order to maintain heritage protection, the relevant government would need to negotiate a conservation agreement, or perhaps acquire and manage the site.

