
10 Implementing change for privately-owned heritage places

This chapter looks at the implementation of the Commission's recommendation to provide private owners with the additional right to appeal heritage listing on the ground of unreasonable costs, together with the use of negotiated conservation agreements in such situations.

It outlines:

- where this right to appeal would fit into the existing identification and listing process;
- the use of negotiated conservation agreements in cases where unreasonable costs arise;
- what such agreements might look like;
- what options are available if agreement cannot be reached;
- how properties already listed could be brought into the proposed system; and
- some good-process reforms to the system.

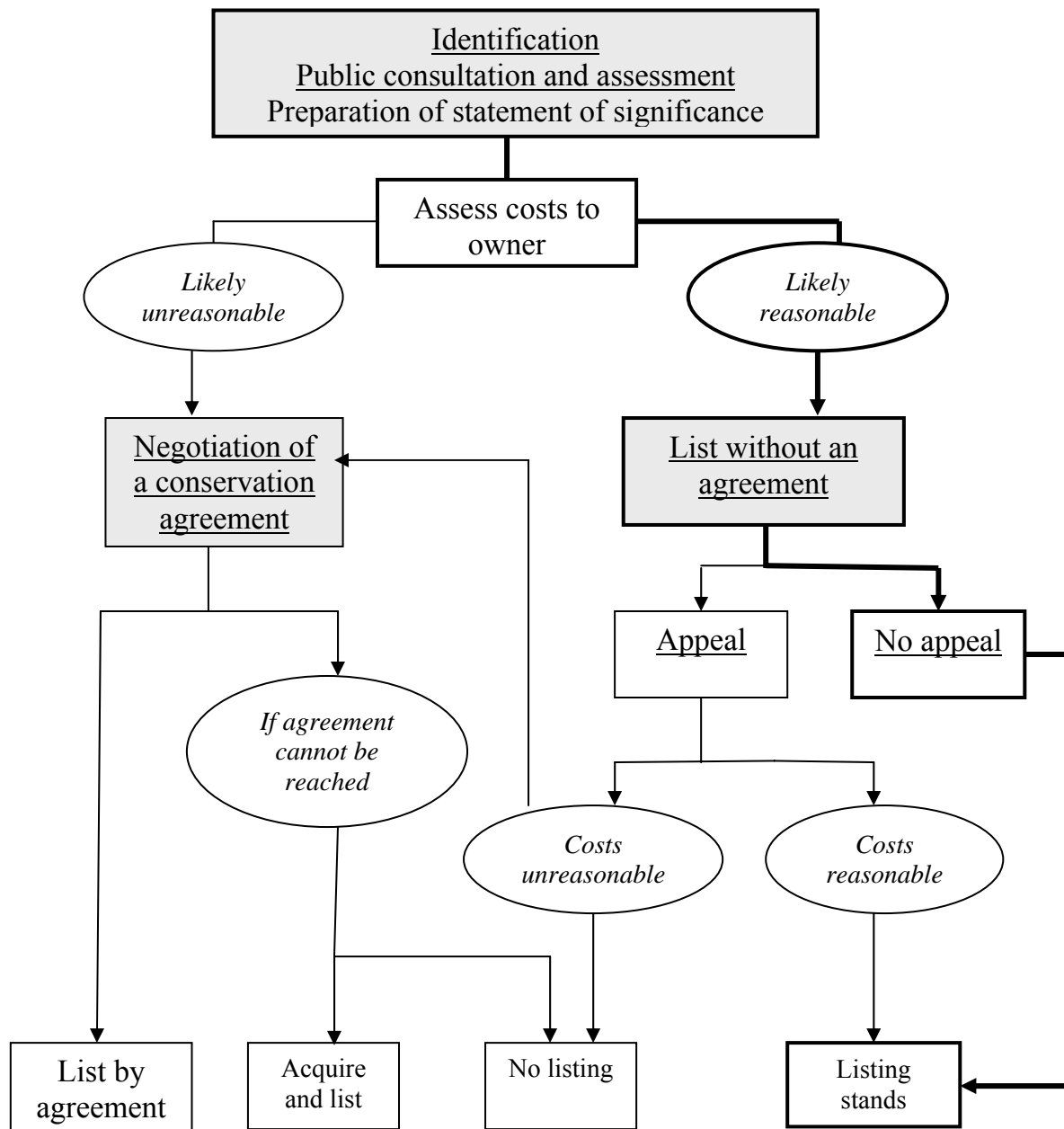
Action is most needed at the local government level, where there is considerable variability in the performance of individual jurisdictions, and growing lists of privately-owned heritage places. State and Territory listing of private properties is also increasing. The Australian Government should take a leadership role in negotiating effective and practical conservation agreements as a co-requisite for all national heritage listings.

10.1 Summary of proposed identification and listing processes

The following provides an outline of the processes proposed for identifying and protecting historic heritage places. It incorporates the proposed additional right to appeal on the grounds of unreasonable costs, together with the use of negotiated conservation agreements for listing heritage places (figure 10.1). Suggestions are also made to improve the listing and protection process that would continue to apply to the majority of places for which the right of appeal is unlikely to be applicable.

The descriptions of the processes (including the figures) in the following sections of this chapter do not cover the appeal rights (and processes) that are currently available to property owners to object to the listing of their property. This is because the Commission is proposing no changes to these existing appeal rights. They should stay in place, as outlined in chapters 4 and 5.

Figure 10.1 **Summary of listing procedure with appeal and agreements**



Identification, public consultation and assessment

The following are the key tasks involved in identifying and assessing places that can be considered for listing and conservation, including a judgment on the best way of proceeding with listing. These tasks include:

- identifying individual places that may have heritage characteristics worthy of conservation, either by nomination from the public or as the result of an assessment by the heritage authority;
- informing the owner and the general public that the place is being considered for listing and seeking their input;
- assessing the place's heritage characteristics to determine whether the heritage values warrant conservation, and if so, the preparation of a comprehensive statement of significance;
- deciding whether conservation of the desired heritage characteristics is most appropriately achieved through:
 - negotiation of a conservation agreement with the owner (necessary if the costs of listing/conservation are likely to be unreasonable), followed by listing subject to the conditions of the agreement; or
 - by direct listing without a negotiated conservation agreement if the costs are likely to be reasonable. Essentially this would activate the current protections available under heritage and related legislation — in particular, assessment of the impact of proposed changes at the time of a development application.

An important element of this part of the process would be the preparation, by the listing authority, of a comprehensive statement of significance for the place being considered for listing. This would involve a preliminary heritage assessment prior to public consultation and a final assessment and statement following consultation if a decision to proceed with listing is made. The statement of significance would include detailed background information necessary for the listing authority to make an informed decision on whether to list or not, and to provide sufficient information for both the owner and the public to assess and make comment on the proposal. Such information should be publicly available and, when finalised, is essential if the owner is to be able to conserve those heritage features of value, and to adequately inform the preparation and assessment of any subsequent development application.

Another important element of good process is adequate notification, particularly of the owner, of the intention to list and protect. This involves:

- directly informing the owner that their property is being considered for heritage listing;

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- providing information on processes whereby the owner can have an input; and
 - providing information backing the decision to consider listing so that the owner, and the wider community, can make informed comment.

Heritage listing can have significant implications for the property owner, and even the fact that the place is being considered for listing can have an impact. To provide a degree of certainty, and as a component of a well-run system, it is important to specify clear time frames for the process to occur. It is also important that there is an incentive for the heritage authority to come to a decision once the process has commenced. This is best achieved by deeming the failure to reach a decision within the specified time period to be a decision not to list the place in question. An important part of this discipline on decision making would be the introduction (for all levels of government) of a specified time period before listing procedures can be recommenced if a decision not to list is the outcome at any stage of the process.

Listing without a negotiated conservation agreement

Where the listing authority considers that the likely cost to the owner would be reasonable, they may proceed directly to list the place, activating the existing set of regulations that protect listed places and activating the existing set of obligations on owners. Based on assessments provided by a range of heritage officials to this inquiry, this could be expected to be the overwhelming majority of cases.

The owner would, however, have the right to appeal this listing if the owner considers that the resulting costs would be unreasonable. Were such an appeal to succeed, listing could only continue following the successful negotiation of the conservation agreement voluntarily entered into by the owner and the relevant listing authority, or if the government (or any other party that welcomed listing) acquired the property in question. Entering into a conservation agreement would involve an assessment by the heritage authority that the heritage values are worth the likely cost associated with such an agreement.

Negotiation of a conservation agreement

Where the listing authority considers that the costs involved for the owner are likely to be regarded as unreasonable, it would be sensible for the listing authority to avoid the time and cost of an appeal and immediately seek to negotiate a mutually beneficial agreement with the owner. Negotiation of a mutually beneficial agreement for listing would also be an option following a successful appeal to listing on the grounds of unreasonable cost, in which case, listing could not proceed without such an agreement.

The aim with negotiated conservation agreements is to achieve cost-effective heritage conservation for the community without imposing unreasonable costs on the owner. It ensures that, where the costs of conservation are likely to be high, that the heritage values for the community are of a similar magnitude. The community, through the listing authority, needs to assess the heritage values it seeks to conserve against the likely cost associated with that conservation.

Such agreements could be used in any situation where the conservation of a heritage place is being considered. However, the Commission considers that their principal use will be in situations where the costs to the owner are unreasonable and where the community considers that the heritage values are nonetheless worth conserving. This would be a minority of places being considered for listing. It would also focus the analysis of benefits and costs to areas where the greatest problems currently arise, that is, where there is the greatest divergence between community and private benefits and costs associated with heritage conservation.

If agreement could not be reached, a number of options can be considered, including:

- abandoning the listing attempt and seeking an alternative property with those heritage characteristics (if available) or with different heritage characteristics; or
- in exceptional circumstances, the government may seek to acquire the property either voluntarily or compulsorily if necessary.

The following sections set out the key steps in the listing process, in more detail.

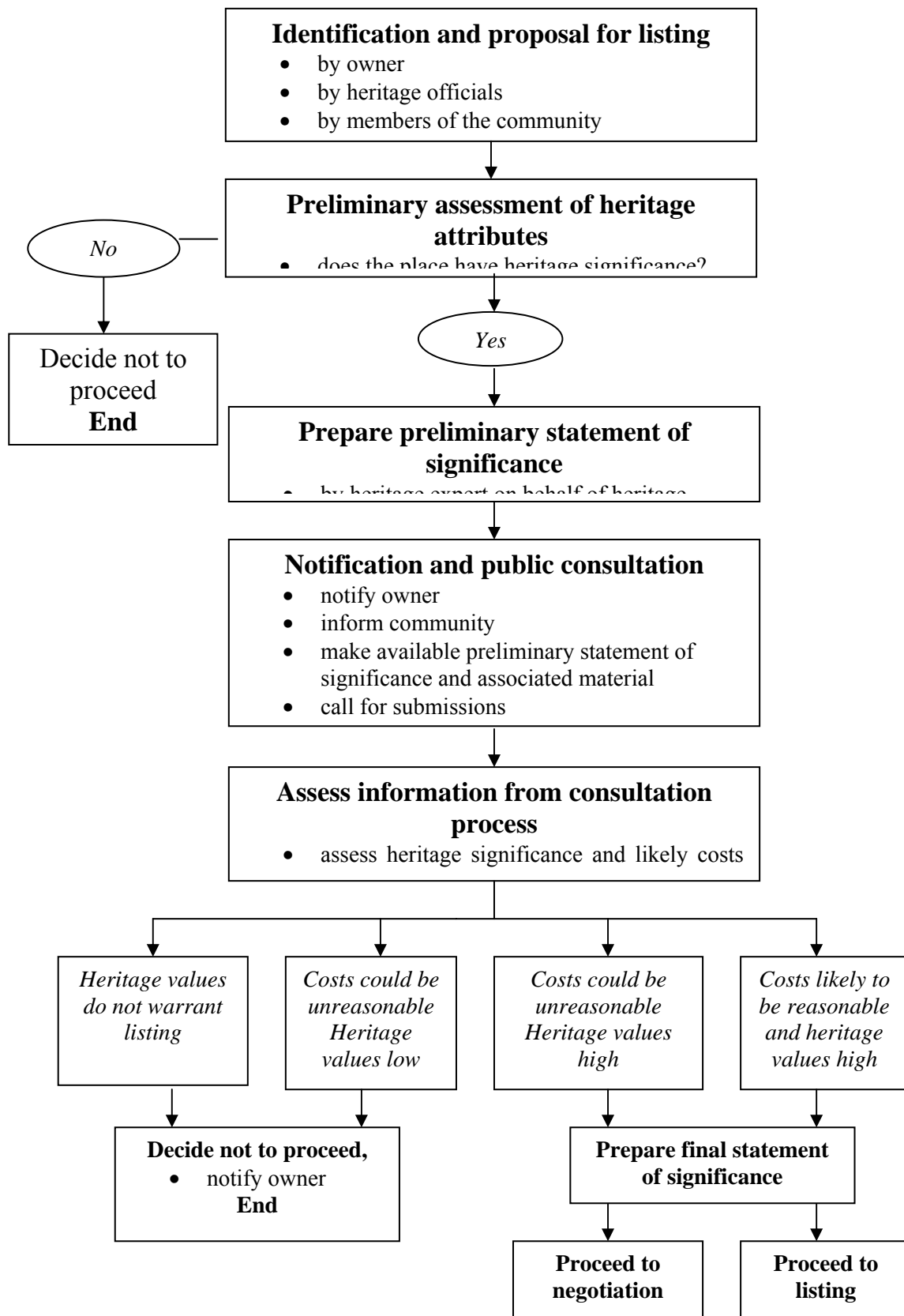
10.2 Detail of process and key elements

There are three key stages in the proposed review process. The first covers the identification, public consultation and assessment phase. The second covers the path of listing without a negotiated conservation agreement. The third involves the negotiation of a conservation agreement, whether undertaken prior to listing or as the result of a successful appeal on the grounds of unreasonable costs.

Identification, public consultation and assessment

Key elements of this group of procedures are depicted in figure 10.2.

Figure 10.2 Identification, public discussion and assessment



Identification

The current arrangements for the identification of places with the potential for listing would remain essentially unchanged. They allow anyone to propose, or nominate to the relevant listing authority, a place for listing. Heritage agencies can also initiate their own assessment, either in response to suggestions from the public or as the result of their own research (such as, as the result of a heritage survey).

Preliminary assessment

Preliminary assessment of the nominated place would be undertaken by the heritage authority responsible for listing the property, or on their behalf by appropriately qualified agents. This assessment would result in a report to the heritage listing authority indicating whether the place has sufficient heritage significance to be worthy of listing and protection, and thus indicating that the process of assessment and consultation for listing and conservation should be commenced.

Preliminary statement of significance

If a place appears to have sufficiently significant heritage characteristics that warrant its consideration for listing and conservation, a preliminary statement of significance should be prepared, by an appropriately qualified heritage expert. This would enable the next stages of assessment (by the heritage authority, the owner and the wider community) to be undertaken on an informed basis.

This preliminary statement of significance would form the basis of the assessment on whether to proceed with listing. After completing the consultation process and final assessment of the place's heritage significance, the statement would be updated and finalised by the listing authority. When finalised, the statement of significance, together with its supporting material should be readily available to the public and be provided to the property owner to enable any subsequent development applications to be undertaken with all necessary information on the protected heritage characteristics associated with the place's listing.

The quality of statements of significance varies widely, from as little as a statement that the place has 'architectural and municipal significance' (box 10.1) to a more comprehensive and detailed package of information (box 10.2).

While some jurisdictions undertake comprehensive assessments, and there is a wide recognition of the need for this to be done, the current arrangements still allow places to be listed, particularly at the local government level, with minimal information on their heritage characteristics. Indeed, in many cases it is not until a

development application is made in relation to a heritage listed property, that the listing authority calls for an independent heritage assessment to be undertaken, requiring this to be done by the owner at the owner's expense. Box 10.3 gives an example of the guidelines from Western Australia. Other jurisdictions provide similar guidelines for the preparation of heritage assessments. The guidelines build on guidance for the assessment of places for heritage conservation contained in the Burra Charter.

Box 10.1 Statements of significance: Example 1

Statement of significance

Architectural, municipal significance.

Recommendations

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Photograph

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Description

(blank)

Modification/conditions

Altered or extended unsympathetically

History

(blank)

Source: Kur-ing-ai Council.

Requiring a heritage study and comprehensive statement of significance to be undertaken and prepared at the development approval stage is completely inappropriate because:

- it implies that the decision to list was not taken on an informed basis;
- the owner does not know what the relevant heritage characteristics are that are to be conserved and protected when managing the property;
- the owner is at risk of wasting time and money preparing a development application with potentially limited chance of success; and
- it is unreasonable to expect the owner to pay for the cost of a study which should be the responsibility of the community on whose behalf the listing was made.

Box 10.2 Statement of significance: Example 2

Statement of significance

Historic, cultural, archaeological, aesthetic, state significance.

Recommendations

(blank)

Photograph

(blank)

Description

The Briars is a well built house retaining a large proportion of the original fabric. Historically it is significant as it marks the first period of residential expansion in Wahroonga which followed the opening of the railway in 1890. The style of the house is transitional between the late Victorian Italianate and Federation. It is a single storey brick house with a hipped slate roof. A projecting brick bay with three stuccoed arches marks the front entrance and intersects a timber framed veranda which surrounds the house to three sides. The veranda is decorated with timber brackets and dentillation. Shuttered french doors open onto the verandah from the principal rooms.

Internally the house retains much of its original joinery and fireplaces. The house is in good condition and has been sympathetically renovated by its present owners.

The grounds have been considerably reduced by subdivision, but several large trees remain on the site. Curtilage to be the property boundary.

Modifications/condition

Substantially intact.

History

The Briars was designed in 1895 by architect Charles H. Halstead for William Balcombe. Balcombe had formerly been Governor of St Helena: it is believed that the house that he lived in on St Helena was also called the Briars and that this house was built to the same plan.

Source: Ku-ring-gai Council.

The information sought in the example included in box 10.3 is the information that should be collected by the authority proposing the original listing as an essential input to an informed decision on whether to list or not. The Commission considers that statements of significance, backed by comprehensive data and analysis, should be prepared at the time that a statutory listing decision is being considered and that this should be undertaken on behalf of the authority proposing listing and at that authority's expense.

Box 10.3 Example of requirement for an independent heritage assessment at the time of a development application

The following guidelines are based on the requirements for heritage assessment required by the Heritage Commission of Western Australia (HCWA).

Documentation is to be undertaken by recognised heritage professionals in their field (ie conservation architect, historian etc. as per HCWA's consultant list).

Documentation to be provided includes:

1. A historical report associated with the place including ownership, occupancy, the dates of initial construction, subsequent additions/alterations and any other historical descriptive or pictorial information (including identification of other similar places within the City of Bunbury considering period of construction, architectural style, use, locations etc).
2. A brief architectural description and documentation of evidence of physical change to the place, as well as descriptions of setting/landscape, etc.
3. Comparative analysis of the place with respect to period of construction, architectural style, use and location. This is necessary to substantiate any claims made in relation to the degree of significance ie. Rarity and representativeness.
4. Relevant assessments of significance incorporating the historic, scientific, rarity, representative, social and aesthetic values of the place. Comments on condition, authenticity and integrity should also be included.
5. Statements of Significance having regard to the above assessment provisions in Point 4.

Source: City of Bunbury's Local Planning Policy – Development process for the assessment of places of heritage value in the City of Bunbury.

Notification of intention to list and public consultation

Notification of the intention to assess a place for listing on heritage grounds involves two elements. First, directly informing the owner, and second, informing the public. Such notification is to enable both the owner and the wider community to have an input into the decision-making process through submissions, and other public consultation processes as appropriate, in relation to the proposed heritage place.

An important feature of a good notification process is direct contact with the owner, providing information on procedures for the owner to make a submission on the matter, together with a copy of the preliminary statement of significance and associated background material. When it comes to notifying the owner, it is not sufficient, as seems to be a common practice at the local government level, simply

to place a notice in the public notices section of the newspaper. Such notification would, however, be appropriate when calling for more general community input into the listing decision. To enable informed comment, the preliminary statement of significance, together with associated background material should be publicly available.

Provision for emergency protection

Where there is a real threat of the loss of heritage values while the listing process is being undertaken, provisions should remain (as is currently the case) for emergency protection. At the State and Territory level, the relevant heritage agency has the authority to seek an interim protection order (or equivalent), while at the local level, councils, in most jurisdictions, can apply to the Minister (under heritage legislation) for interim protection in relation to a place being considered for local listing. Such interim protection should remain in force only for a clearly specified time period associated with the time frame of the listing procedures.

Final assessment

Following the public consultation process, the heritage authority would assess the information received, and make a decision on whether to proceed with listing. A decision to proceed with listing would also involve a decision on how to proceed — whether by immediate listing or through the negotiation of a conservation agreement. If the decision is made to proceed with listing, a final statement of significance would need to be prepared. As outlined earlier, the statement of significance should be comprehensive, be provided to the owner and be available to the public, and be undertaken on behalf of the listing authority seeking to have the place protected.

A place being considered would fall into one of the following four broad categories, which would influence the decision on how to proceed.

1. The heritage values do not warrant listing (they are not significant enough or are well represented by already protected places). The decision would be not to proceed with listing. When such a decision is made, it would be notified to the owner and the community would be informed. This decision would activate the time limit before another consideration of heritage listing could be initiated in relation to that particular place.
2. The heritage values are low and the costs to the owner are likely to be ‘unreasonable’ (were the listing to be challenged). The decision would be not to proceed with listing and, as above, notification of this decision would follow.

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3. The heritage values are high enough to warrant listing and the costs to the owner is likely to be reasonable (that is, the owner is unlikely to succeed if the listing were to be challenged on the grounds of unreasonable costs). The decision would be to proceed with listing, activating the existing protections and procedures outlined in the relevant heritage and planning legislation. The owner (and the public) would be notified of this decision, including information on the owner's appeal rights and processes.
 4. The heritage values warrant listing, but the costs to the owner may be unreasonable (that is, the owner could be successful if the listing were challenged on the grounds of unreasonable costs). The decision would be to approach the owner to begin negotiating a mutually agreeable conservation agreement and management plan, rather than listing and waiting for an appeal with associated costs and a high likelihood of the appeal being successful.

Listing without a negotiated conservation agreement

Key elements of the this group of procedures in the listing process are depicted in figure 10.3.

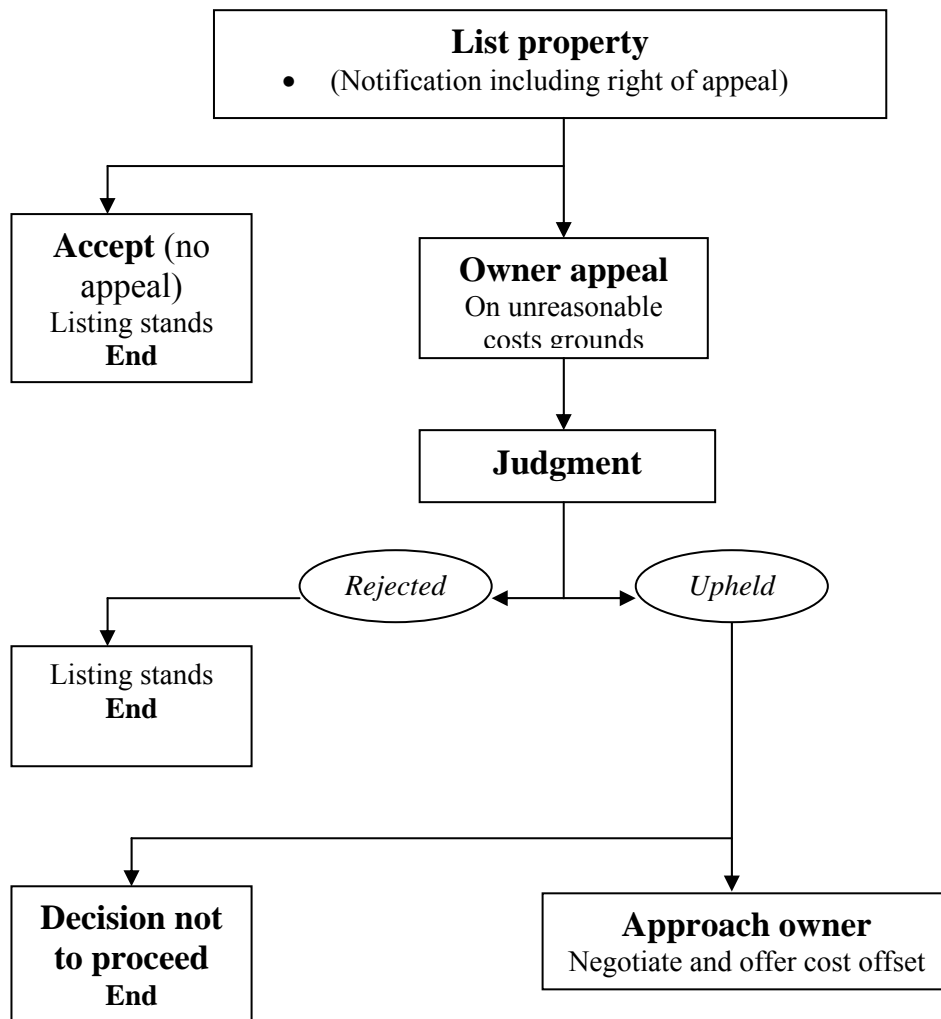
List property

A decision to proceed directly with listing would follow an assessment by the listing authority that the heritage values are worth protection, and that the cost to the owner as the result of listing is likely to be reasonable. That is, it is judged by the listing authority that it is unlikely that the owner would be successful if the listing were appealed on the grounds that it would impose unreasonable costs.

Once listed, the property would be subject to the protections, obligations and requirements outlined in existing heritage or planning acts as applicable. Essentially this involves an obligation not to damage the place's heritage characteristics and for any subsequent development applications to be assessable against those heritage characteristics by the relevant authority .

A decision to list a place would involve direct notification to the owner, including the provision of the final statement of significance and associated background material. This is essential if the owner is to subsequently manage and protect the important heritage features, and also to enable any subsequent development application to be prepared on an informed basis. Notification of the owner of the property's listing would also involve providing information on appeal rights, including those on the grounds of unreasonable costs.

Figure 10.3 Listing and appeal process



An appeal on the grounds of unreasonable costs

Once listed, the owner would have a period of time during which the listing could be challenged on the grounds that it would impose unreasonable costs (or on existing grounds such as a disputed heritage significance or failure to follow due process).

All jurisdictions have agencies which handle appeals in relation to planning decisions. In New South Wales, this is Land and Environment Court, while in Victoria, this is the Victorian Civil and Administrative Tribunal. These agencies should be well placed to assess whether the restrictions associated with heritage listing would impose unreasonable costs on the owner. However, it is important that the appeal procedures are both accessible and timely to ensure that owners are not

unnecessarily hindered in accessing their recommended right to appeal listing decisions on the grounds of unreasonable costs.

For listing decisions made after the introduction of the right to appeal on unreasonable costs grounds (new listings) it would be reasonable to specify a set time period after the notification of the listing decision, during which the owner can initiate an appeal. However, as outlined in section 10.3, the Commission is proposing transitional arrangements to handle places already listed and any such time limit on the right to appeal should not limit the recommended appeal rights for owners of properties already listed at the time that the appeal rights for new listing decisions is introduced.

Judgment on appeal and consequences

Two outcomes would result from the appeal process. First, if the appeal is rejected, the listing would stand and the place would continue to be subject to the general requirements outlined in the relevant Heritage or Planning Act. Second, if the appeal is upheld, the listing would lapse and subsequent listing would only be possible following the negotiation of a conservation agreement with the owner voluntarily entered into, or following direct acquisition of the property by the government, or a new owner.

As with the initial steps in the listing process, provision would need to be made for temporary protection (if the property was considered to be under immediate threat) while negotiations over a conservation agreement occur.

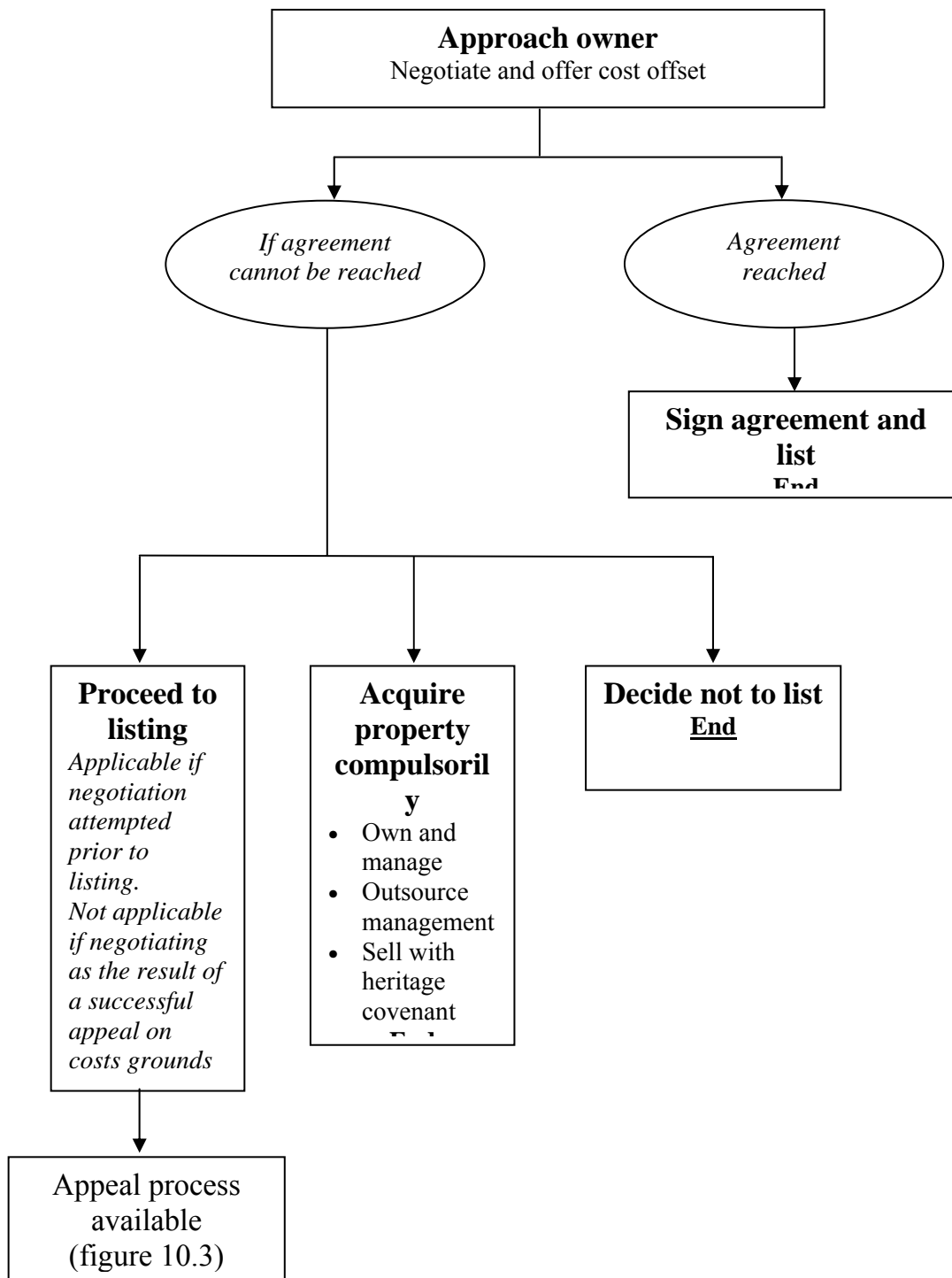
Negotiation of a conservation agreement

Key elements of the this group of procedures are depicted in figure 10.4.

Timing of negotiations

Negotiation of a conservation agreement can take place at two stages in the proposed process. First, the listing authority may judge that, were it to list the property, the owner is likely to face unreasonable costs and thus has a high probability of success in an appeal on those grounds. Rather than list and go through the expense of defending against such an appeal with little likelihood of success, a procedure that would also unnecessarily antagonise the owner, the listing authority can directly approach the owner to negotiate a conservation agreement prior to listing.

Figure 10.4 **Negotiation**



The second situation where negotiation of a conservation agreement would be initiated would follow a successful appeal on the grounds that listing imposes unreasonable costs on the owner. Listing can only proceed once a negotiated conservation agreement has been voluntarily entered into by both parties, or if the

government directly acquires the property. Once experience in assessing the likely cost impact on owners has been developed by the listing authority, it would be expected that most agreements would be negotiated prior to listing, rather than waiting for an appeal to be successful.

In the first situation, where negotiation occurs prior to listing, if negotiation is unsuccessful, the authority retains the option of listing the property if it is prepared to defend against any subsequent appeal on unreasonable costs grounds.

State and Territory heritage legislation already have provisions enabling the heritage agencies to enter into conservation agreements with owners of heritage properties. The Commission envisages that its recommendations would more formally activate these provisions in situations where listing would impose unreasonable costs on owners. Each jurisdiction should review their legislation to ensure that adequate provisions are in place to enable the negotiation of conservation agreements.

RECOMMENDATION 10.1

In relation to State, Territory and local listing, State and Territory governments should:

- ***mandate that statements of significance be prepared at the time that a statutory listing decision is being considered and that these statements should be prepared by the listing authority;***
- ***require that listing authorities directly notify owners of any intention to add their place to the statutory list;***
- ***require that listing authorities make available a preliminary statement of significance to the owner and the public prior to public consultation;***
- ***require that listing authorities follow timely public consultation procedures following a decision to consider a place for statutory listing;***
- ***require that listing authorities, when proceeding with a listing, provide a comprehensive final statement of significance to the owner of the property and make it publicly available;***
- ***implement an additional appeal grounds in relation to listing, based on unreasonable costs; and***
- ***ensure that listing authorities have the authority to negotiate and enter into heritage conservation agreements.***

Matters that could be included in a negotiated conservation agreement

Developing conservation agreements between the relevant jurisdiction and owners would, in effect, result in a contract introducing a form of covenant on the property. The Commission envisages that this agreement, or covenant, would remain in force with any subsequent change in ownership. That is, subsequent owners would be required to accept the existing agreement when purchasing the property and abide by its conditions for the remaining time-period of the agreement.

The extent and complexity of individual agreements could vary widely, and for important and unique sites may require a more detailed, site-specific, agreement. However, for many heritage places the development of a standard or template contract, either for direct use or as a basis for negotiation, would seem an appropriate development. Appendix E provides some examples of conservation agreements from other jurisdictions, indicating some variability in the length and complexity of the model contracts.

A range of elements that it would reasonably be expected to feature in an effective system of conservation agreements are in box 10.4.

Accommodating changed circumstances

Both heritage values and the costs of conservation will change over time. Community values evolve, with some places becoming more or less significant in their contribution to the community's sense of history and place. Owners' attitudes to historic heritage places may also change, affecting their willingness to voluntarily conserve, for both public and private benefit. With economic development and changing demographics, the pressures on historic heritage places, and thus the cost associated with their continued conservation, will also change. In addition, conservation agreements with owners of historic heritage places will involve the expenditure of public funds. Such expenditure should be open to review, and procedures should be in place to enable a periodic reassessment of their effectiveness.

For these reasons, the option for the renegotiation of conservation agreements should be available. This could, for example, be accommodated by the negotiation of agreements covering differing time periods, depending on the nature of the heritage characteristics being conserved, with the option to renegotiate, or roll over the agreement in the future.

Box 10.4 Elements of an effective conservation agreement system

An effective conservation agreement system, would be expected to have the following features:

1. An agreed statement of the place's heritage values.
2. Outline allowed works, development or uses.
 - these activities would be ones that clearly do not affect the place's identified heritage values. This could include external painting, internal alterations, constructing fences, developments at the rear of property.
3. Outline specific prohibited works, development or uses.
 - these activities would be ones that do affect the place's identified heritage values. This could include external structural alterations, demolition, removal or alteration of specific features that give rise to the identified heritage values.
4. Establish an agreed system whereby works, development or uses that are not covered above can be assessed against the place's identified heritage values.
5. Provide for effective dispute resolution system, such as determination by neutral third party experts.
6. Outline the assistance to be provided to the property owner. Such assistance could be a one-off sum or an ongoing contribution.
7. Provide for a mechanism to review the property's heritage values after a given period of time, for example, after 10 years.

Sources: Burra Charter and NSW Heritage Guidelines.

Negotiated conservation agreements and planning

The more widespread use of heritage agreements may necessitate a clarification of the relationship between heritage decisions and planning approval arrangements. In the first instance, any heritage agreement would need to be consistent with the general zoning of the property. That is, the agreement would not permit a development that would not be allowed under the existing zoning regulations. For example, if the zoning regulations prohibited, say, a three-storey extension, a heritage agreement could not be used to override this restriction. At the same time actions approved or allowed by the zoning status of the property should not override the conditions contained in the conservation agreement. For example, if the heritage agreement precluded a second storey in the interests of maintaining the place's heritage integrity, it should not be possible to use the underlying zoning regulations (that may allow such an extension) to override the heritage agreement.

Any development of the property sought by the owner would need to be consistent both with the conservation agreement and the general planning restrictions applicable to the property. Because the heritage characteristics are covered by the conservation agreement to be enforced by the parties to that agreement, the conditions of the agreements would not be part of the development approval process. It is up to the owner, in conjunction with the relevant heritage authority, to ensure that any development application lodged with local government is consistent with both the heritage agreement and the planning regulations.

If agreement cannot be reached

If agreement cannot be reached between the owner and the relevant listing authority over the provisions of a conservation agreement, the authority has a number of options.

In the first instance, it may decide not to pursue listing of that particular property. If this is the case, the owner would be notified of the decision not to pursue listing. Depending on the nature of the heritage characteristics being sought, and the availability of other properties offering similar characteristics, the authority may seek to identify alternative properties for listing and/or initiate negotiations with owners of such properties.

In the second instance, where the heritage values are particularly high, and alternatives are not available, government may seek to purchase the property concerned. In exceptional circumstances, the government may consider using its existing powers of compulsory acquisition. Together with the ability of government to ‘walk away’ from negotiations, the option of compulsory acquisition provides a limit to the owner’s ability to ‘ask too much’ and provides the ultimate incentive to negotiate and seek agreement in good faith.

The same two options apply where an existing agreement ends and there is a failure to reach a re-negotiated or new agreement. In the absence of any other path being pursued (such as direct acquisition), failure to reach a new agreement would result in the removal of the property from the relevant heritage register. That is, the heritage-related use restrictions would be removed, normal planning restrictions apply and any financial support for conservation would cease.

There are a range of options available for government if a property is purchased or acquired. These include:

- government ownership and management through organisations such as the New South Wales Historic Houses Trust;

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- government ownership with management contracted out; and
 - reselling with covenants to ensure the protection of heritage characteristics.

The last option would be one that minimises the net cost to government, and could be operated through a revolving fund.

Compulsory acquisition would, however, be an action ‘of last resort’ requiring ministerial approval and being subject to appropriate appeals mechanisms as to matters of procedure and the level of compensation provided. As local government can not compulsorily acquire, use of this option at the local level would require a council to convince the relevant State Minister of the necessity for the State to act on its behalf.

Provisions for compulsory acquisition apply in other countries, typically at the initiation of government, but in New Zealand there are provisions where, in certain circumstances, the owner can move to initiate acquisition (box 10.5).

Box 10.5 Compensation in New Zealand

Rights to compensation for owners of heritage properties are currently limited to those owners whose property is subject to a heritage order. These owners are able to apply for relief to the Environment Court under section 198 of the Resource Management Act. In order to get relief, they must prove that they are unable to put their property to reasonable use and they have been unable to sell it for market value. The Environment Court can order that the Heritage Protection Authority acquires the property from the owner at market value or remove the heritage order.

Source: Nahkies, B. (1999), p. 11.

In the United Kingdom, the Secretary of State has the power to confirm a Compulsory Purchase Order by an appropriate authority if it appears that reasonable steps are not being taken to properly preserve the building. In exceptional cases, the UK Secretary of State also has to power to compulsorily acquire a listed building and any relevant land in such circumstances.

Time limits and protection from subsequent listing attempts

Listing can be a time consuming process, introducing uncertainty for the owner. This is compounded by the ease with which the listing process can be recommenced, particularly at the local government level. The Commission has received comment that simply the threat of listing has had a significant effect on the ability of the owner to realise the value of their property on the open market. In part,

this problem would be lessened by the introduction of the right to appeal on the grounds of unreasonable costs. However, it is also important that the process is not excessively arbitrary or time consuming. A resolution, one way or the other, is needed if the owner is to be able to make sensible plans for the future. In this situation it is important that the onus for completion of the listing process within the specified time frame is placed on the authority seeking listing, with any failure to make a decision within the specified time period being deemed to be a decision not to list the place in question.

An important element of certainty is the introduction (for all levels of government) of a specified time period before listing procedures can be recommenced if a decision not to list is the outcome at any stage of the process.

For example, in the United Kingdom a Certificate of Immunity (COI) is available, which precludes the Secretary of State from listing a building for five years and precludes the planning authority from serving a Building Preservation Notice [interim protection] for that period. It is designed to give greater certainty to developers proposing works which will affect buildings that may be eligible for listing.

The Commission considers that such immunity from listing and from the imposition of interim protection, should automatically follow any decision not to list a property. However, a system that requires an application for such immunity (as is the case in the United Kingdom) to be made in each case would be administratively costly and would effectively limit such protection to major developers who have the resources necessary to make such an application.

10.3 Bringing already listed properties into the proposed system

The introduction of the right to appeal listing on the grounds of unreasonable costs, together with the use of negotiated conservation agreements in those situations, is directed towards improving the incentives for both owners and the community when considering places being proposed for conservation. In particular, it aims to have the costs of conservation considered at the time that the decision to conserve and protect a property is made. This will provide an incentive for the listing authorities to introduce protection only where the extra community benefits exceed the additional costs of their conservation, and provides an incentive for owners to actively conserve valuable heritage characteristics where it is otherwise costly to do so.

The proposed changes raise the issue of what changes, if any, should be made for owners of places already listed. They have restrictions and obligations placed on them, often with little consideration of the costs involved and with little assistance provided to contribute towards those costs. There will certainly be some cases where these costs are high, and cases where these costs exceed the value of the heritage characteristics being conserved. This is an inevitable result of the current system where there is no requirement for listing authorities to take into account the costs of conserving heritage values when deciding on whether to list a heritage property, even when the costs are high and the heritage value low. This problem could be addressed by transitional arrangements, whereby owners of places already listed at the time that the right to appeal is introduced in relation to new listing decisions, with a period of time during which they could appeal their current listed status on the grounds that it imposes unreasonable costs.

Owners of already listed properties, however, fall into two broad groups. First, those who had their place heritage listed after they had purchased the property. Second, those who have bought places that were already heritage listed.

In relation to the first group, allowing such owners to appeal their existing listing on the grounds of unreasonable costs would ensure that they are treated fairly by the heritage system and would ensure that resources (both private and public) are not wasted protecting properties with little heritage value compared to the costs of conservation.

In relation to the second group, because the heritage-listed places have been acquired after listing occurred, any restrictions or additional costs imposed by listing would have been reflected in the price of the property at the time of purchase. Subsequent owners will have purchased knowing the restrictions and obligations involved with heritage listing of the property and, by willingly purchasing with such knowledge, have accepted the costs involved. In such a situation, it would be difficult to argue that listing has imposed unreasonable costs on the current owner. It would be highly unlikely that owners in such situations could make a valid case that they are bearing unreasonable costs associated with the listed status of their property.

The impact of allowing owners of already listed properties to appeal listing on the ground of unreasonable costs is difficult to assess. In part, it depends on the number of properties that have changed hands since listing and thus would have little grounds for a successful appeal. For the remainder, it depends on the number that could successfully argue ‘unreasonable costs’, and the nature of the places already listed.

For example, there are almost 14 000 places on State and Territory registers (table 3.3). If half of these are privately owned properties (this varies from jurisdiction to jurisdiction, see chapter 3, but is broadly the case) and only 10 per cent of owners are discontented with the system, as asserted by some in the heritage industry, this would imply some 700 properties could make an appeal. However, as many of these would have changed hands since listing the number that would be successful would be much lower. The number that could appeal would be much greater at the local government level as the number of places is greater (some 76 000 individual places, table 3.5) and the proportion in private hands is higher.

Many listed places will have high heritage conservation values and will be well worth the cost involved with a public contribution to their conservation. Others may be more marginal and not represent an effective use of conservation funding. Such places would be removed from statutory lists once an assessment is made of their heritage values compared to the cost of their conservation. The Commission has proposed, in recommendation 9.1, that the right to appeal listing on the grounds of unreasonable costs also be available for those owners of properties that were acquired before the property was statutorily listed.

Some historic heritage places are covered by private covenants (or similar contractual arrangements), and some former government-owned properties have been sold with heritage-related conditions attached. Such covenants or contracts would remain in place and be unaffected by the arrangements proposed by the Commission. Essentially they would be unlikely to be able to make a case for assistance on the grounds of unreasonable costs as this matter has already been addressed when the covenant was entered into or when the property was acquired with an agreed covenant in place.

10.4 Application to different tiers of government

The implications of a proposal to enable owners to appeal listing on unreasonable costs grounds, together with the greater use of conservation agreements will differ between the jurisdictions within Australia. Current arrangements vary, and jurisdictions have differing degrees of institutional sophistication and development, particularly at the local government level. Despite such differences, most have established frameworks for managing historic heritage conservation. The Commission's recommendations would nevertheless involve some re-focusing of their activities.

The Commission considers that action is needed most urgently at the local government level where there is considerable and growing use of heritage listing,

often as a replacement for the more constrained planning process. In addition, a much larger proportion of locally listed places are privately owned. State listing of private properties, however, is increasing and, with the exception of New South Wales, now forms half or more of the places on State and Territory lists (table 3.1). The Australian Government has listed only one privately-owned property.

Australian government

Under the Environment Protection and Biodiversity Conservation Act, the Australian Government has the key institutions and tools in place to operate a system where the listing of privately-owned heritage places is on the basis of negotiated conservation agreements. Currently, the Australian Heritage Council assesses whether a place meets one or more of the national heritage criteria and makes a recommendation to the Minister on that basis. The Minister decides whether to list the place on the National List. This typically involves negotiation with a State Government before a place is entered onto the National Heritage List. Provision exists for conservation agreements to be entered into with private owners. However, such agreements with private owners are not a universal requirement for listing, they come into play only if the Australian Government cannot act ‘unilaterally’. To date, no such conservation agreements have been entered into.

The Commission considers that the Commonwealth should take a leadership role by negotiating a conservation agreement prior to, or in conjunction with, listing for all places being considered for inclusion on the national list. This would also signal the importance that the Australian Government places on the cooperative conservation of places of heritage significance and, given the importance of such places, such an agreement, together with a sound management plan would seem to be an essential component of good conservation practice.

State and Territory governments

Key responsibilities for the conservation of historic heritage places rest with State and Territory governments. They have strong regulatory powers and these have been used extensively for the conservation of historic heritage places. Not only have they responsibility for the conservation of places of State and Territory significance, but also they set the regulatory framework for local government involvement in conservation. Their role is crucial to a coherent and effective national framework.

To implement the Commission's recommendations for introducing a right of appeal on the grounds of unreasonable costs, together with the greater use of conservation agreements, would require a range of legislative, institutional and operational changes at the State and Territory level. In particular, it would involve changes to each jurisdiction's Heritage Act to include the right, for non-government owners, to appeal heritage listing of an individual property on the grounds of unreasonable costs. Such changes will require the development of expertise and resources within the existing listing authorities. For example:

- Existing heritage agencies/councils would continue to be responsible for heritage listing, but would have the additional responsibility for negotiating and monitoring conservation agreements/management plans with some private owners.
- Improved and strengthened processes requiring the development and presentation of comprehensive and meaningful statements of significance would be necessary. This includes the preparation of preliminary statements prior to public consultation and the preparation of a final assessment prior to listing or the negotiation of a conservation agreement.
- The development of, or access to, expertise to allow the assessments of the likelihood that listing would impose unreasonable costs on the owner.
- Development of 'agreement' contracts, including template agreements or a package of standard clauses.
- Development of skills and resources for negotiation and monitoring of conservation agreements.
- A review of funding levels and of funding tools that heritage agencies would have access to, to enable them to provide assistance flexibly through negotiated conservation agreements. A review of funding and assistance options is presented in the following section 10.5.

Local government

At the local government level, the implementation of the Commission's recommendations would require changes to each jurisdiction's planning legislation in those areas under which local governments list individual properties of local heritage significance. Such changes would involve including essentially the same provisions as are suggested to be included in the relevant Heritage Acts to introduce the recommended appeal right and provide for the use of negotiated conservation agreements where costs are unreasonable. Because of the variability in local councils' implementation of listing procedures, there is a particular need to ensure

that good process changes are introduced and that State and Territory governments ensure that action is taken to ensure that they are followed.

Implementing the Commission's recommendations at the local government level could raise resourcing issues for councils in areas with many heritage properties of local significance, though this would depend on the extent to which the costs imposed on owners are unreasonable. While many councils have large numbers of properties listed, many cover places where the heritage consideration would not differ significantly from the considerations that would enter into reviews of development applications under their existing zoning. While the regulatory frameworks for councils to consider historic heritage would be set at the State level, the councils would have to develop operational procedures suited to their particular circumstances. And those circumstances vary considerably — ranging from the Brisbane City Council with a population of 900 000 and annual budget of \$1400 million to the Shire of Cue (incorporating the heritage town of Cue) in Western Australia with a population of 367 and annual budget of \$2.4 million.

The changes proposed by the Commission to introduce good-process reforms and to allow formal appeals on the grounds of unreasonable costs, together with negotiated conservation agreements, will involve much greater institutional change at the local government level than at the State level. It is likely that some local government areas will struggle to afford to set up such structures for the few local listings that would occur in any given year. One option is for local councils to group together with neighbours to share resources (such as heritage advisers) necessary to undertake the process effectively.

Access to skills and resources will also be necessary to act on the proposed requirement to develop meaningful statements of significance, including the ability to make preliminary assessments of the likelihood that listing would impose unreasonable costs on the owner. Again, the sharing of resources between a number of local councils may overcome costs for the few that may be considered in any one year.

Local governments will also need to develop the knowledge and expertise necessary to develop, negotiate and monitor conservation agreements with private owners. However, as these skills, including the development of template agreements or standard clauses, will need to be undertaken at the State level, local governments may be able to tap into this work with useful guidelines and/or examples being developed and provided by the better resourced State heritage bodies.

10.5 Government expenditure and assistance mechanisms

Heritage conservation can be expensive, even given a well targeted and prioritised system for identifying historic heritage places. Therefore, the questions:

- where will funding come from?
- what are the appropriate levels of government expenditure?
- what methods might governments use to cost-effectively raise the funds they have decided to allocate for heritage conservation? and
- what are the best mechanisms for governments to disburse those funds?

are all matters of public policy concern.

In this inquiry, many participants, including some governments, pointed to a lack of financial resources as a primary cause of problems with the existing historic heritage system. Inadequate resources for the assessment of places for heritage listing were seen as leading to deficient assessments. Combined with insufficient funding for actual conservation works, poor conservation outcomes were the unavoidable result. Accordingly, they were disappointed that the Commission's Draft Report had not concluded that 'inadequate funding' was a central weakness of the current system and had not recommended a significant increase in government expenditures on historic heritage conservation, particularly from the Australian Government.

Sources of funding

The primary revenue-raising sources for conservation purposes are:

- *private sources* — earnings from commercial activities, philanthropic donations, memberships and the owner's own funds; and
- *public sources* — taxpayer/ratepayer funding.

Firstly, owners of historic heritage places should make best efforts for each place to 'pay its own way' to the extent this is possible, recognising that for many places this will be extremely difficult (even with community donations, volunteer efforts, etc). Taxpayer/ratepayer funding should be seen as complementary to private expenditure and as a last resort, rather than a first, as there is unlikely ever to be enough taxpayer/ratepayer funding available to satisfy all conceivable requests for public funds — that is, priorities have to be set. Importantly, public expenditures should not displace private funding sources, and should only be used if the

community benefits of conservation are assessed to be greater than the costs of conserving the ‘extra’ heritage value.

Levels of government expenditure on heritage

Participants generally referred to historic heritage as the ‘poor cousin’ of natural and indigenous heritage when it comes to direct government expenditure. However, it is difficult to make such a comparison, as the absence of reliable data does not allow an accurate assessment to be made of how much governments are spending annually on historic heritage conservation. As discussed in chapter 3, such expenditure would include the costs of:

- administering the overall historic heritage system, including any appeals arising therefrom;
- operating and maintaining government-owned and managed historic heritage properties; and
- providing advice and incentives to private owners to help offset the ‘additional’ and ‘forgone opportunity’ costs of their ‘community-demanded’ heritage provision.

As indicated in table 3.4, certain expenditures on historic heritage by Australian, State and Territory governments in 2004-05 totalled about \$46 million. However, total expenditure would be well in excess of this figure. In addition, information was not available to allow a similar estimate of total expenditure (on historic heritage identification, assessment, listing, advice, heritage-related approvals, appeals and assistance) by the 630 local councils in Australia.

Conceivably, total annual government expenditure on historic heritage conservation, across all jurisdictions in Australia, could be well in excess of \$100 million per annum. While not directly comparable, the Australian Government’s recurrent (discretionary) expenditures on natural and indigenous heritage in 2004-05 were around \$300 million and \$8 million, respectively (NHT 2006; Australian Government 2004).

Despite the difficulties of identifying and measuring government expenditure on historic heritage conservation, there is a widespread, and not entirely unjustified view that:

Budget appropriations for historic heritage in Australia have generally stagnated or declined over the last decade. (EPHC 2004, p. 32)

The overall level of expenditure by the various levels of government on historic heritage conservation will always be a contentious issue (as with any other area of

government expenditure). However, realistically, it can only be decided by the respective governments in the context of the overall level of funds available to them and in comparison with (or more accurately, in competition with) other demands on public money. Only the political process can elicit the community's views on whether government expenditure on heritage conservation should be increased in comparison with the community's other expectations.

Whatever that level of expenditure might be, each respective tier of government should have primary responsibility for funding the conservation of national, State or locally-significant historic heritage. This is in line with the agreed principle of subsidiarity for managing historic heritage conservation. Further, no case was presented as to why the Australian Government should undertake expenditure beyond its direct, nationally significant, responsibilities. Decisions on expenditure for the conservation of historic heritage places that are of State or Territory significance are generally best left to those governments. It is not up to the Australian Government to impose its views on the desired outcome, or the necessary means and expenditures to achieve them. The Australian Government makes significant transfers to the States and Territories, and each jurisdiction can decide how to spend the available funds as they see fit.

Similarly, it is generally for each local government to decide on expenditures for the conservation of locally-significant historic heritage places. However, there is nothing preventing the States from providing their local governments with additional funds for heritage purposes, if they see a need.

It is, of course, open for the Australian Government and for each State government to undertake expenditure on specific projects outside of this three-tier framework (as has occurred recently at the Australian Government level, with funding for the refurbishment of two State-significant cathedrals, in Sydney and Melbourne).

Decisions on what the overall level of expenditure should be on historic heritage conservation (*vis-à-vis* all other community demands) are best made by an informed political process.

While it is not possible, nor appropriate, for the Commission to judge what might constitute an appropriate overall level of expenditure on historic heritage conservation for any specific jurisdiction, it is possible to come to some conclusions on what are the more cost-effective ways to raise public funds and deliver support to private owners of listed heritage properties. Accordingly, the following sections look separately at a range of public revenue-raising and assistance delivery mechanisms, and make comments on their appropriateness as means of providing public funds and incentives for historic heritage conservation.

Revenue-raising mechanisms

Substantial increases in expenditures will no doubt be required in many jurisdictions, if governments commit to:

- a) implementing a rigorous system for the identification and assessment of historic heritage places (including up-front assessments of reasonable cost);
- b) managing their own heritage places as model historic heritage owners; and
- c) financially supporting private owners of listed historic heritage places, including the increased use of negotiated conservation agreements in situations where listing is judged to impose unreasonable costs on the owner.

A number of policy tools are open to one or more levels of government through which they can, if considered warranted, add to the heritage funding pool. Taxpayer/ratepayer funding, the hypothecation of lottery revenues (whether or not specific to heritage) and heritage levies are all methods that have been used, both in Australia and overseas.

The obvious source of funding for heritage conservation is an explicit budget allocation from consolidated revenue, collected from taxpayers. The Commission has assessed the current system for the conservation of historic heritage places to have deficiencies such as less than robust listing processes and poor conservation outcomes in some instances. This could be acting as a damper for additional government expenditures. Implementing the Commission's recommended improvements could overcome this impediment to increased budget allocations and government expenditure.

Heritage lottery fund

In the United Kingdom, the Heritage Lottery Fund has been operating since 1993. It operates as part of the National Lottery, with every pound spent on a lottery ticket resulting in a distribution of 4.66 pence to the Heritage Lottery Fund. A variable component of this is then distributed to historic heritage conservation groups and individuals, to assist building repairs and conservation work, acquisition of land and buildings, and projects to improve access. The annual allocation, for all forms of heritage, is currently around £330 million (HLF 2006), or A\$815 million.

On a much smaller scale, the Lotteries Commission of WA allocates a fixed amount from WA lotteries to a range of programs, including heritage funding of around \$1–1.5 million annually.

A number of participants spoke highly of the UK Heritage Lottery Fund model, proposing that a similar funding mechanism be introduced into Australia. The particular attraction of this approach is that a specified level of funding would be available with a high degree of certainty each year, free from competing interests that have a claim on general government revenue each year at budget time.

There is nothing preventing State governments from legislating that a certain percentage of profits from a lottery (whether or not heritage-specific) or any other gambling activity — indeed from any source — be hypothecated to an historic heritage fund, as is currently practised in Western Australia. However, there are two fundamental problems with this approach. First, the level of funding would be independent of any assessment as to whether it generated a net community benefit. All funds are likely to be used for historic heritage conservation simply because the monies are there and must be spent on that purpose, even on listing or works where the net benefit is very small, or even negative. Second, as all public funding is a scarce resource, it is appropriate that funding for historic heritage conservation be assessed against alternative uses for such monies — that is, there is no particular reason why funding of historic heritage should be hypothecated in preference to funding other public services.

Heritage levy

Under relevant State legislation, most local councils have the ability to impose a heritage levy on their ratepayers. The monies raised could go into an Historic Heritage Fund and, subsequently, be distributed to private owners for ‘community-demanded’ conservation works and repairs, or to pay for conservation management (or specialised heritage maintenance or restoration) of council-owned heritage places. The advantages of the use of a heritage levy are that the community is made aware of the cost of meeting its desire to conserve historic heritage places in its area. Some Australian local councils already have explicit heritage levies in operation.

Assistance mechanisms

Some inquiry participants active in ‘the Heritage industry’ asserted that the Draft Report had not adequately considered the merits of alternative incentive/assistance mechanisms.¹ Some also pointed to the differing assistance requirements for

¹ The heritage industry’s interpretation of the word ‘incentive’ — that is, any mechanism which provides assistance for conservation purposes — differed from the Commission’s — that is, any mechanism which evokes a behavioural response among heritage stakeholders.

heritage places in rural, suburban and inner city locations.

When considering improving the incentives for historic heritage conservation, the Commission has not focussed on increasing government assistance as such (although this may well be a result). Rather, it has sought to reduce perverse incentives — those structures or mechanisms that generate inappropriate outcomes — and replace them with positive incentives — those structures or mechanisms that encourage appropriate outcomes. To this end, the Commission's preference is for mechanisms which enable fully informed decisions to be made, avoiding such things as: hidden costs; hidden assistance; and the transfer of costs to others who do not benefit or are not the decision makers in relation to those benefits and costs. Where assistance is provided it should be targeted, transparent and accountable.

Within the budget allocation for heritage conservation in each jurisdiction in Australia, there is a wide range of assistance mechanisms available to governments to assist private owners in their conservation efforts on behalf of the community. Their appropriateness is reviewed briefly below for each level of government.

Australian Government

Tax relief

At the national level, financial support for private owners of heritage-listed properties can be provided through various forms of income tax concessions (e.g., rebates, credits or deductions), to reduce the cost of maintenance or restoration.

Many heritage industry participants called for the reinstatement of the Australian Government's *Tax Incentive Scheme for Heritage Conservation*. This tax rebate scheme, which operated from 1994 till 1999, offered a 20 per cent rebate under a cap of \$2 million per annum.

The scheme was criticised on a number of grounds, mostly related to the overall cap on funding. As a result, it was, in effect, an application-assessment scheme with high administrative costs and difficult eligibility rules aimed at keeping expenditure within the limit set. As a consequence, it had a very low take-up rate — which was exacerbated by the fact that it offered no benefits to large conservation projects; its carry forward provisions meant that some owners with a low annual tax liability often had to forfeit part of the value of the rebate; and it was not available to 'not-for-profit' organisations.

The National Incentives Taskforce (NIT) noted in its 2004 report, *Making Heritage Happen*, that:

The Commonwealth is not supportive of the reinstatement of the tax rebate scheme, on the grounds that (a) such schemes still require application-assessment processes and therefore may be more efficiently, effectively and transparently delivered through grant programs, and (b) grant programs allow taxpayers funds to be better targeted at heritage conservation projects that are of highest priority. (EPHC 2004, p. 8)

Further, when considering the pros and cons of tax concessions compared to outlay programs, the National Commission of Audit (NCA) Report commented:

Tax concessions and public spending programs can have a similar net effect on the budget balance. This is because a tax concession reduces revenue which, if collected, could be used to fund a spending program to meet the same objective.

Tax expenditures are less visible than outlays programs and are therefore likely to receive less critical review of appropriateness by government and parliament than outlays programs. In addition, tax expenditures are usually uncapped, open-ended and their costs can rise rapidly. ... If the objectives are considered appropriate, consideration should be given to converting tax concessions to outlay programs. (NCA 1996)

A variant for a national tax scheme was put forward by the Kensington Residents Association:

Heritage listed properties can be seen as an investment in the country's heritage. Accordingly, they should be treated as investment properties with repairs, maintenance and insurance classified as tax-deductible items. (sub. DR309, p. 2)

Another variant raised was allowing an owner to claim a tax deduction for any decrease in land value as a result of entering into a conservation agreement. This concession is currently available for private nature conservation activities in Australia.

Other tax measures proposed included stamp duty exemptions (mostly a State/Territory tax — see below), accelerated depreciation allowances and capital gains tax exemptions.

The Commission generally agrees with the conclusions of the NIT and NCA outlined above. In particular, tax concessions are poor vehicles for targeting assistance to areas with greatest net benefit to the general community, and such assistance would fund a lot of conservation activity that would occur anyway for private rather than community benefit. In addition, such generally-available Australian Government assistance measures would be contrary to the agreed division of heritage responsibility, where each level of government is responsible for funding those heritage activities that relate to its own listing decisions. Accordingly, the Commission strongly recommends against such schemes.

Tax deductibility of donations

Achieving ‘tax deductibility status for donations’ allows the value of donations made to accredited ‘non-profit’ bodies (or funds) to be deducted from the taxable income of donors. Currently, all National Trusts in Australia have deductibility status, which helps to promote the flow of resources (cash and property) to these organisations.

Such a tax expenditure transfers funds from consolidated revenue to the Deductible Gift Recipient (DGR) in such a way as to encourage private philanthropy and to provide public support to meritorious organisations (charities and DGRs) via the tax system.

Grants and loans

Given the concerns with tax measures, the Commission considers that assistance to private owners for conservation works and building repairs is, in the vast majority of cases, most efficiently, effectively and transparently delivered through a competitive grants process.

Grants allow taxpayers’ funds to be better targeted at heritage conservation projects that are of highest priority in terms of the greatest net benefit to the general community. They also allow the targeting of assistance to an ‘appropriate’ share of the total identified conservation works — that is, a share which covers the ‘additional’ (above normal) conservation, compliance and/or capital costs attributable to the restrictions imposed by heritage listing — in recognition of the shared benefits of the works to the owner as well as to the community. However, grants can be costly to administer.

There is no rational case for subsidised finance to property owners, either in the form of direct loans or loan subsidies, since there is no evidence of relevant market failure in capital markets (that is, the ability of property owners to borrow). An explicit tied grant for specific purposes, competitively assessed, would be more transparent and efficient. Such direct outlays are also the preferred mechanisms for delivering assistance to private heritage owners at the State/Territory and local government levels.

State and Territory governments

Land tax abatement schemes

Full or partial reduction of land tax, to reduce the ‘opportunity cost’ of retaining heritage values, is a relevant incentive mechanism at the State/Territory level. This is generally achieved by either adjusting the mill rate (that is, the tax rate per dollar of assessed value of land) or, more appropriately, by revaluing heritage-listed properties on the basis of ‘current’ (heritage-restricted) use rather than ‘highest and best’ use of the land. Most State and Territory legislation provides for such revaluations to occur, which could lead to reduced land tax assessments. Such schemes would at least partially offset the costs to the owners of properties whose market value was diminished by listing.

However, in considering such assistance schemes, it is important that they do not become a vehicle for cost shifting between jurisdictions. For example, land tax is a State and Territory tax and thus, it would be an appropriate vehicle for concessions in relation to State- or Territory-listed properties. However, if the property is nationally or locally-listed, it would be inappropriate to expect a State or Territory government to provide automatically such assistance (through a reduction in its revenue) to fund the listing decision of another jurisdiction.

Stamp duty reductions

Full or partial reductions in stamp duties paid on heritage-listed property transactions (to help offset any loss of value due to listing) are potential vehicles for providing assistance for heritage conservation. However, such assistance is not related to any particular conservation activity, nor to any assessment of the benefit of the property to the community. Property sales and transfers are decisions quite independent of whether the property is heritage-listed or not. Such assistance would fail the criterion of being well targeted.

Local governments

As evidenced in appendix B (section B.5), the Local Government Survey conducted by the Commission indicates that most local councils already offer grants for conservation work, with a varying financial contribution being required from the property owner. A few councils offer subsidised loans. Aside from such direct outlays, a wide range of incentives have been used, or considered for use, by local councils, depending on their individual circumstances.

Revolving funds

Revolving funds can be set-up and contributed to by any tier of government. However, they are most relevant at the local government level.

A revolving fund is a pool of capital created and used for heritage conservation, typically for the conservation of 'at-risk', low-return heritage properties that others are unwilling, or unable, to invest in. They are essentially a 'sponsor of last resort' for heritage places facing demolition by neglect (EPHC 2004). Such funds are revolving in that they are typically used to purchase places in need of conservation, with those places subsequently being refurbished and resold with a covenant attached (which aims to ensure the desired conservation outcomes) and with the proceeds of the resale being deposited into the fund. Initial 'seed' funding can be provided by various public and/or private sources, with the net cost of the fund being limited to any losses involved with resale.

In Australia, this type of fund already exists for the purpose of historic heritage conservation in the cities of Melbourne and Hobart, while the NSW Historic Houses Trust set-up an Endangered Houses Fund in 2001.

Overseas, some 170 Preservation Trusts have been set-up in the United Kingdom at the initiative of either a local authority or as a joint venture between a local authority and a community group. In all instances, they operate as companies limited by guarantee and have charitable status for tax purposes (EPHC 2004).

Such schemes generally involve an assessment of the benefits and costs for each funding decision, and typically involve willing participation to the mutual benefit of both parties. Accordingly, they could potentially be used as vehicles to fund the conservation of heritage properties where the private costs are judged unreasonable, but where agreement cannot be reached over a conservation plan. To this end, they might be considered an alternative 'last-resort' acquisition mechanism to compulsory acquisition.

Rate rebates

Most local councils have the ability to seek revaluations for rating purposes from their respective State governments. However, they have been reluctant, generally, to offer rate rebates or concessions for fear of eroding their revenue base.

Relatively few councils currently offer such incentives to owners of historic heritage properties. In the Northern Territory, however, all owners of listed heritage properties are eligible for rate rebates of 75 per cent, for residential properties, and 25 per cent for commercial properties (EPHC 2004).

It could be argued that, if local councils were required to give rate relief to State- or nationally-listed heritage places, this would conflict with the agreed division of responsibilities between jurisdictions. Their funding is the responsibility of the Australian or relevant State government. Alternatively, it might be argued that since residents in the municipality derive substantial benefits from the existence of a State- or nationally-listed property in their municipality (and more than other taxpayers in the State or the rest of Australia), rate relief would be one way of making an appropriate contribution.

Local governments may, however, offer rate relief for places they choose to list as locally significant. However, such assistance is not well targeted to, nor conditional on, conservation activity, and is not targeted to places of community value compared with those where the value of heritage conservation accrues primarily to the owner.

Planning incentives

Under relevant State legislation, most local councils are permitted to relax planning and building requirements to encourage use or conservation of a heritage site. In the case of commercial properties, this may involve flexibility with parking and open space requirements, variations to development standards and/or the provision of density bonuses. So long as such incentives or concessions are not fundamentally incompatible with the underlying planning regulations (which are presumably in place for good reasons), such incentives can be targeted to encourage particular desired conservation activities, and also at areas where conservation would provide the greatest benefit to the general community.

Transfer of development rights

In the central business district of large cities, where the market for development rights is most prevalent, local councils have the option to provide an incentive for historic heritage conservation through the use of transferable development rights (TDR) — or what are otherwise known as ‘air space’ schemes. In such areas, the owner of a listed historic heritage property may sell unused development rights to the developer of a non-heritage site, which may then allow that developer to construct a larger building than would otherwise be allowed, and the historic property owner to fund conservation work from the proceeds. The City of Sydney has operated a TDR scheme, known as the Heritage Floor Space (HFS) Scheme, for the past couple of decades. Its success has fluctuated markedly, depending on the strength of the market for commercial properties in Sydney’s CBD.

The Professional Historians' Association (NSW) noted that the innovative process of creating tradeable fractions of cultural environments is likely to increase and thus provide further market solutions to heritage problems. It said:

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. ... Perhaps 'cultural tree credits', 'sandstock brick futures' or 'wood smoke emission rights' will emerge as solutions to heritage 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. (DR306, p. 18)

Again, the Commission has no significant concerns with the use of such schemes by local councils, provided they are not fundamentally incompatible with the objectives of the relevant planning rules.

Advisory services

Subsidised (generally free) advisory services for private owners of heritage properties are currently provided by most councils with heritage lists. State governments also contribute towards the cost of these advisory services on a shared basis. For smaller councils, particularly in rural areas, these services are often shared between adjacent jurisdictions. While it is not clear that there is an information market failure somewhere in the heritage system, the provision of such assistance could nonetheless be justified if it involves assisting owners meet the compliance costs of their heritage obligations.

Reducing compliance costs

There are a number of avenues open to local councils to reduce 'red tape' costs for the owners of heritage properties. These include the waiving or fast tracking of development applications for minor heritage-related works, and the waiving of development application fees in relation to heritage activity required as a result of heritage listing. The largest single cost that owners typically face when making a development application for heritage-listed properties is the requirement to undertake a heritage study and prepare a statement of significance as part of the application. The Commission has recommended that such studies and statements be prepared by the listing agency at the time the listing decision is made and not be a requirement placed on the owner at the time of a development application.