
4 Australian, State and Territory governments' heritage systems

The current system for heritage conservation has three tiers, with specific roles for the Australian, State, Territory and local governments. The difference between Australian, State and Territory heritage relates to the significance and scope of a place's heritage value. The criteria for the identification of heritage values are relatively consistent between the various levels of government. Australian, State and Territory governments all require their agencies to conserve the heritage values of assets they own. However, such requirements are not separately funded, and this can cause problems where conservation does not form part of the core business of the responsible agency. The Australian, State and Territory heritage systems rely largely upon legislative controls to conserve listed heritage places. These controls limit the development and use of the place in order to conserve its heritage values. Negotiation and bilateral agreements could be central to the system of conservation for heritage places but are not widely used at any government level.

In the current three-tier system for the identification and conservation of Australia's historic heritage, specific responsibilities rest with the Australian, State, Territory, and local governments. This chapter deals with the heritage legislation at the Australian, State and Territory government levels. Chapter 5 looks in more detail at local government responsibilities and practices to conserve historic heritage of local significance.

A consistent theme throughout the Australian, State and Territory heritage legislation is the criteria against which heritage is assessed (box 4.1). This consistency is a result of the Burra Charter and the now repealed *Australian Heritage Commission Act 1975* (Cwth), which influenced many of the State and Territory Heritage Acts.

While the criteria are very similar, the difference between the Australian and State or Territory levels is in the thresholds and scale of significance. That is, the Australian Government's National Heritage criteria require that a place have 'outstanding' significance to *all* Australians. In contrast, State and Territory criteria require that a place has significance to the whole of the relevant State or Territory.

Box 4.1 Common heritage assessment criteria

- The place demonstrates importance in the course, or pattern, of the jurisdiction's natural or cultural history.
- The place has uncommon, rare or endangered aspects of the jurisdiction's natural or cultural history.
- The place has potential to yield information that will contribute to an understanding of the jurisdiction's natural or cultural history.
- The place has significant heritage value because of the place's importance in demonstrating the principal characteristics of:
 - a class of the jurisdiction's natural or cultural places; or
 - a class of the jurisdiction's natural or cultural environments.
- The place has importance in exhibiting particular aesthetic characteristics valued by a community or cultural group.
- The place demonstrates a high degree of creative or technical achievement at a particular period.
- The place has strong or special association with a particular community or cultural group for social, cultural or spiritual reasons.
- The place has a special association with the life or works of a person, or group of persons, of importance in the jurisdiction's natural or cultural history.

Source: Australian, State and Territory Heritage Acts.

4.1 Australian Government heritage legislation

Almost 30 years after the Australian Government first provided legislative recognition of historic heritage places, the protection and conservation of historic places is now placed within the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). The EPBC Act (s. 528) defines 'heritage value' as:

... the place's natural and cultural environment having aesthetic, historic or social significance, or other significance, for current and future generations of Australians.

The amendments established two Australian Government lists — the National Heritage List and the Commonwealth Heritage List.

The National Heritage List comprises places of national significance, with values or characteristics that have special meaning for all Australians. The list can include overseas places (if agreed to by the other country). This list gives effect to the 1997

COAG three-tier decision for the Australian Government to protect places of national and international significance.

The Commonwealth Heritage List comprises places of heritage significance located on Commonwealth land, including places owned and managed by the Australian Government. Government ownership enables these places to be directly protected and managed. Places could also be located overseas, so long as they are on Commonwealth owned or leased land. The Commonwealth List is the only list where the Australian Government has constitutional power to directly conserve and manage the listed places.

Role of the Australian Heritage Council

The Australian Heritage Council (AHC) was established by the *Australian Heritage Council Act 2003* and replaced the Australian Heritage Commission. Its main roles are: the assessment of places nominated for the National and Commonwealth Heritage Lists; advising the Minister on specific matters relating to heritage; promoting the identification and conservation of heritage; and keeping the Register of the National Estate (RNE). The AHC is also a member of the COAG Heritage Chairs and Officials forum.

The Council comprises one Chairman and six other members. They are appointed by the Minister. Two members must have expertise in the area of natural heritage, two in historic heritage and two in indigenous heritage.

The Council still maintains the Register of the National Estate

Historically, the RNE was the only Australian Government heritage list. The RNE is a national inventory of natural and cultural heritage places. Because the RNE predates the three-tier system for heritage conservation, it includes places which have significance at the national, State and local levels. Following the EPBC Act amendments, the role of the RNE has become largely informational and as a record of heritage places (CHCANZ, sub. 139, p. 9). There are around 13 000 places listed on the RNE.

The public is still able to nominate places for inclusion on the RNE. The AHC is still able to assess and enter the items on the RNE if they meet the criteria — the criteria are virtually identical to the National Heritage criteria and the Commonwealth Heritage criteria (see box 4.1), although without the threshold requirement. Contradictory to the three-tier principle, the AHC also places unsuccessful applicants to the National Heritage List onto the RNE (AHC, sub. 118, p. 12).

The RNE does not place any direct legal constraints or controls over the actions of State or local governments, or private owners. However, many States require that places listed on the RNE be included in the relevant local planning scheme, and hence, are subject to heritage controls at the local level (chapter 5).

National Heritage List

The first step for adding a place onto the National Heritage List involves the AHC assessing and advising the Minister of a place's National Heritage values. Following this, the Minister makes the final decision whether to include a place on the list.

Criteria

To be entered onto the National Heritage List, a place must meet at least *one* of the National Heritage criteria. These criteria are similar to those outlined in box 4.1.

An important part of the assessment is the 'significance test'. That is, the place must be assessed as having *outstanding* heritage value to the Australian community as a whole. The test for significance is a comparative test with other similar places. This allows the AHC to determine whether a place has 'more' or 'less' significance than similar places, or whether the place is unique within Australia.¹

Nomination and assessment of places

Any person may nominate a place to be included on the National List. There have been 97 public nominations since January 2004 (DEH, sub. 154, p. 18). In addition to public nominations, State, Territory and local governments, the Australian Government Minister and the AHC can nominate a place for the list. The public is able to comment on a proposed listing. The Minister makes the final decision on listing, but must consult with all relevant Ministers prior to making the decision to list a property.

DEH considers that greater use could be made of 'well argued nominations from State and Territory governments'. Such a process, DEH argues, would be a highly effective method to promote the National Heritage List and 'would be consistent with the spirit of the COAG [three-tier] decision' (sub. 154, p. 18).

¹ The thresholds for the Commonwealth Heritage List and the Register of the National Estate are different to those used for the National Heritage List — places that may be of significance to only local or state-level communities can be included.

For all nominations,² the Minister must request the AHC to conduct an assessment, which is carried out against the National Heritage criteria. When requesting an assessment, a brief description of the nomination must be published on the Internet. If the Minister decides to reject the nomination after the assessment, the person nominating must be advised in writing and provided with reasons. In its assessment, the AHC must not consider any factor that does not relate to the question of whether the place meets the criteria.

For every place the AHC assesses, the Council seeks to identify each owner and occupier and advise such persons of its assessment, and give them time to comment. All received comments are then provided to the Minister.

In addition to public nomination, the AHC is able to assess any place against the National Heritage criteria and its assessment is provided to the Minister (s. 324GA). The Minister may also request the Council to assess a place.

Emergency listing is possible where a place within Australia has, or may have, one or more National heritage values, and any of those values are under threat. Following listing, the procedures outlined above need to be followed, prior to the Ministerial decision to list a place permanently.

The Minister decides whether to list

The Minister makes the final decision on the entry of places onto the List, after receiving advice from the AHC regarding a place's National Heritage values. When the Minister receives an assessment from the AHC, and is satisfied that the place meets one or more of the criteria, the place can be included on the List — with a corresponding statement of its National Heritage values (s. 324J). The decision to list must be published in the Government Gazette. There is no statutory requirement for the Minister to take into account the costs imposed by listing, or that adding a place to the National Heritage List would result in a net community benefit.

The decision to list may involve 'considerable negotiation' with the owners of the proposed place and also shared responsibility where the owner is a State, Territory or local government (DEH, sub. 154, p. 13). In practice, negotiations can be protracted (e.g., with Tasmania regarding Port Arthur). The Heritage Council of Victoria commented:

The Draft Report appears to overemphasise the current role of the Commonwealth Government in the conservation of historic heritage places that are not in its ownership.

² Except for a nomination considered vexatious, frivolous or not made in good faith, or where additional information is requested but not provided.

The effectiveness of the limited number of conservation agreements prepared for places on the National Heritage List has also been overstated in the opinion of the Heritage Council. (sub. DR242, p. 12)

Removal of places from the List

A place, or part thereof, can be removed from the List, if the Minister is of the opinion that the place no longer contributes to any of the National Heritage criteria, or for defence and security reasons. Removal can only occur after the Minister has received advice from the AHC. Such removal must be done in writing and published in the Gazette.

Australian Government control over listed places

Entry onto the National Heritage List imposes a series of Australian Government controls over the place. The national heritage values of places on the National List are recorded under the EPBC Act as a matter of 'National Environmental Significance' and can trigger the Ministerial approval process. This process is triggered by actions that have, or might have, significant impacts on the National Heritage values of listed places. The Minister decides whether a proposal meets this test.

Once a development proposal triggers assessment under the EPBC Act, an environmental assessment must be carried out. The purpose of such an assessment is to provide information for the decision on whether to approve, approve with conditions, or reject the proposal. These assessments can be conducted in one of five ways, decided by the Minister:

- preliminary documentation;
- public environment report (PER);
- environmental impact statement (EIS);
- public inquiry; or
- an accredited assessment process.

Assessment under the first three requires the party proposing action to prepare and publish draft assessment documentation in accordance with published guidelines. Second, there must be a public consultation period. Third, the assessment document is finalised, taking into account public comments. Fourth, DEH prepares an assessment report for the Minister.

Assessment by accredited process occurs when processes under other legislation (either State, Territory or Commonwealth) are accredited by the Minister. Accreditation occurs in addition to other bilateral agreements and declarations that already exist for other forms of assessment.

Bilateral and Conservation agreements

The EPBC Act provides for the use of bilateral and conservation agreements as these can ensure effective conservation outcomes. Bilateral agreements are made with respect to State Government owned places and conservation agreements relate to non-government owned places. The Australian Government's use of 'conservation by agreement' has been limited — of the 24 heritage places listed on the National Heritage List,³ only one is subject to a voluntary agreement (albeit yet to be finalised) and this property is State government owned.

However, most places listed are owned by State governments. Bilateral agreements for these places are essentially Australian Government accreditation of State processes. These processes are contained within an agreed bilateral management plan for the heritage place. Bilateral agreements may specify that certain actions do not require approval under the EPBC Act, so long as each adheres to the bilaterally accredited management plan (s. 46). There is currently one bilateral agreement in the process of being finalised — the Draft Bilateral Agreement for the Sydney Opera House.⁴ DEH commented that the listing process:

... shares responsibility between the different levels of government. For instance, a state may retain significant responsibilities (both statutory and financial) for World Heritage and National Heritage listed places where they are in state ownership. Therefore, there is usually considerable negotiation with a state government before a place is entered in the World Heritage List or National Heritage List. (sub. 154, p. 13)

However, some participants (including Heritage Council of Victoria) have criticised the approach of the Australian Government to bilateral agreements. The Australian Council of National Trusts noted:

... there have been no conservation [or bilateral] agreements negotiated concerning any one of the 23 places now listed ... from the perspective of [State and Territory] governments, the Commonwealth has not yet brought sufficient funds to the table to warrant the making of an agreement. (sub. DR237, p. 44)

For National Heritage places that are owned by State Governments, the successful completion of a bilateral agreement would, most likely, not be the determining

³ As at April 2006.

⁴ <http://www.deh.gov.au/epbc/publications/draft-sydney-Opera-house-bilateral.html>.

factor in the successful conservation of the place — as government owned ‘iconic’ places are not typically under threat.

Conservation agreements can be entered into by the Australian Government and private owners. The Australian Government can not enter into a conservation agreement unless it is satisfied that the agreement will result in a net benefit to the conservation of the place’s heritage values and is not inconsistent with the National Heritage management principles (s. 305). Bilateral agreements must also include and follow the heritage management principles (s. 51A) — box 4.2. The EPBC Act allows Regulations to be made outlining considerations that must be taken into account when assessing whether the agreement results in a net benefit. The Act imposes penalties for failing to adhere to an agreement.

Box 4.2 National Heritage management principles

- The objective in managing National Heritage places is to identify, protect, conserve, present and transmit, to all generations, their National Heritage values.
- The management of National Heritage places should use the best available knowledge, skills and standards for those places, and include ongoing technical and community input to decisions and actions that may have a significant impact on their National Heritage values.
- The management of National Heritage places should respect all heritage values and seek to integrate, where appropriate, any Commonwealth, state, territory and local government responsibilities for those places.
- The management of National Heritage places should ensure that their use and presentation is consistent with the conservation of their National Heritage values.
- The management of National Heritage places should make timely and appropriate provision for community involvement, especially by people who:
 - have a particular interest in, or associations with, the place, and
 - may be affected by the management of the place.
- The management of National Heritage places should provide for regular monitoring, review and reporting on the conservation of National Heritage values.

Source: DEH (Heritage Fact Sheet 15).

To date, only four places on the National Heritage List are non-government owned, and no conservation agreements have been entered into — the EPBC Act requires that an up-to-date list of conservation agreements is available to the public (s. 310). In order to guarantee the effective conservation of nationally significant heritage places, all non-government owned places listed on the National Heritage List should be subject to a negotiated conservation agreement.

If a person bound by a conservation agreement engages or proposes to engage in conduct that constitutes a contravention of the agreement, another person bound by the agreement or the Minister may apply to the Federal Court for an injunction (s. 476).

Commonwealth Heritage List

A place can only be included on the Commonwealth Heritage List⁵ where it meets one or more Commonwealth Heritage criteria, and is *entirely* within a Commonwealth area (or if outside Australia on Commonwealth owned or leased land). The majority of the requirements and processes for entry and assessment are identical to those outlined above for the National Heritage List (box 4.1).

The difference between the National and Commonwealth criteria is one of degree of significance and scope. First, the National criteria refer to ‘outstanding’ value whereas Commonwealth refers to ‘significant’. Second, the National criteria require that a place has outstanding value to the Australian community as a whole, whereas the Commonwealth list can contain heritage items that have only State, Territory or local significance.

As the owner, the Australian Government can impose a more stringent and direct protective conservation regime for Commonwealth Heritage places, than in relation to places on the National Heritage List.

The Commonwealth Heritage List requires that Australian Government agencies prepare management plans and heritage strategies and minimise adverse effects on the heritage values of listed places.

The primary mechanism for the conservation of Commonwealth Heritage places is the management plan. The management plan must follow the Commonwealth Heritage management principles, which are identical to the management principles outlined in box 4.2. An agency may ask the Minister to endorse the plan. Endorsement can only happen if the plan provides for the conservation of the heritage values of the place concerned (s. 341ZD). Agencies with endorsed plans do not need to seek advice from the Minister over proposed actions that are covered in that plan. In the absence of an endorsed plan, all Australian Government agencies must seek the Minister’s advice prior to undertaking actions likely to have an impact on an item’s heritage values. Prior to the Minister advising the agencies, the AHC must advise the Minister of its opinion of the impact of the proposal.

⁵ The sections in the EPBC Act for the Commonwealth Heritage List are ss. 341C–341R.

Heritage responsibilities for Australian Government agencies

Australian Government ownership or control of a property that has, or may have, heritage values (either National or Commonwealth) triggers processes that the Australian Government agency must adhere to. These processes are:

- the agency must assist the Minister and the AHC in the identification, assessment and monitoring of those values (ss. 324Z and 341Z);
- the agency must assist the Minister to produce a management plan; and
- if the agency sells or leases a property on either list, it must ensure, where practicable, that there is a covenant in place to protect the relevant values. Otherwise, the Minister must attempt to enter into a conservation agreement with the buyer or lessee (ss. 324ZA and 341ZE).

Australian Government agencies are prohibited from taking an action that has, will have, or is likely to have an adverse impact on the place's heritage values (either National or Commonwealth). This is subject to two exemptions: that there is no feasible and prudent alternative to taking the action; and all measures that can reasonably be taken to mitigate the impact of the action on those values are taken. This is quite a stringent requirement as the exemptions have been interpreted very narrowly by the Courts.⁶

Repair orders

The Australian Government is also able to apply for repair orders for places on the National and Commonwealth heritage lists. This power enables the Minister to take any action necessary to repair, mitigate, or prevent damage to a place's heritage values. The costs of any works can be recovered from the owner of the relevant National or Commonwealth heritage-listed place (ss. 499 and 500).

Repair orders bring the Australian Government into line with the States and Territories who all have similar powers (see below).

Offences and penalties

The EPBC Act contains numerous offences and provides for substantial penalties for actions affecting both National and Commonwealth Heritage places. The main

⁶ See *Yates Security Services v Keating* (1990) 25 FLR 1. The previous Australian Heritage Commission Act contained the same restrictions.

offence relating to heritage is in relation to taking actions that may affect a place's heritage value without approval. This offence carries a maximum penalty of seven years imprisonment and/or a fine of up to \$550 000 for individuals, or \$5.5 million for companies.

It is also an offence to breach a condition of an approval. It carries a maximum penalty of two years imprisonment and/or a fine up to \$110 000 for individuals, or \$1.1 million for corporations.

Financial support

The Australian Government provides financial support for historic heritage through direct assistance schemes, ad hoc grants, and the establishment of Australian Government heritage agencies.

A direct assistance scheme called the 'National Heritage Investment Initiative' is budgeted to provide \$10.5 million between 2005-06 and 2008-09. The aim of the Initiative is to provide financial incentives for the restoration and conservation of places of important historical heritage to Australia. Priority will be given to places included in the National Heritage List.

In addition to this direct funding scheme, the Australian Government has committed to several ad hoc conservation and restoration programs. This includes the restoration of St Mary's Cathedral and the Church of St Mary's Star of the Sea. It also includes the restoration of several lesser known sites. In total, the amount of ad hoc funding is around \$14.2 million between 2005-06 and 2008-09.

The Australian Government provides around \$24 million annually for the running of the Heritage Division in DEH, as well as around \$29 million annually for the Sydney Harbour Federation Trust. It also provides \$800 000 per year as grants-in-aid to the National Trusts.

Views on the Australian Government heritage system

Most participants support the three-tier system, and hence the focus of the Australian Government on historic heritage places of national significance and places it owns. The Chairs of Heritage Councils of Australia and New Zealand stated:

The reality is that at a national level, if you talk about policy framework, the policy framework through national, state and territory is really quite a sophisticated framework in its own way. It actually sets levels of significance in the way in which properties are to be managed. (trans., p. 857)

Nonetheless, there is some concern that the Australian Government has used the three-tier approach to remove funding it had previously supplied to States, Territories and local governments and demonstrates a 'lack of leadership'. Australia ICOMOS commented that:

There are perceptions that since the passing of the new legislation, the Australian Government has turned its attention inward, focussing all its energies on the National Heritage List and reducing its influence in setting national standards for heritage conservation and in encouraging community involvement in heritage conservation. There appears to be little or no research, no policy or program development, little engagement in public heritage issues and limited fostering of networks such as the National Cultural Heritage Forum, which has not met under the current Commonwealth Minister for the Environment and Heritage. (sub. 122, p. 20)

Bishop Ian George, former Anglican Arch-Bishop of Adelaide, submitted that:

... the Commonwealth government should not withdraw from concern for the funding of heritage, at a wide range of levels. It's clear from the report that an increasing number of Australians have significant care for the built and natural heritage of this country. As the Commonwealth acquires ever-increasing tax surpluses a significant percentage of those funds, I submit, should be used to preserve our heritage, either by the Commonwealth directly or by funding of state, territory and local government heritage programs. (DR trans., p. 258)

The ACT Heritage Council said that there appears to be no consistent distribution of funding, even for its own heritage places. The Council argued that funding seemed to be based on political considerations:

All I can say is that the Commonwealth, in particular, has not been consistent in providing funding for even its own heritage obligations in relation to Commonwealth heritage places, and that the allocations which have been made in recent years have often been made on purely political bases, not on the basis of established heritage need or distribution, equitably, of those funds. There have been a number of one-off grant programs in the last couple of years which have been a bit dicey. (DR trans., pp. 552-553)

The ACT Heritage Council also noted that, from its position, heritage conservation does not receive the same level of assistance from the Australian Government as natural heritage:

Well, the ACT government can expend and does expend to the limits of its capacity, but it sees - well, sitting in my seat, I see substantial support going to things like ALPS processes, for example, in a natural environment, some of which is cultural, but most of it is natural, but I see no parallel support for the historic environment coming from the Commonwealth coffers. (DR trans., p. 553)

The Heritage Council of Victoria told the Commission that Commonwealth funding is needed at all levels of government, especially in order to adequately conserve projects that require large sums of money (including education):

Without funding from the Commonwealth, the delivery of large-scale heritage projects is often beyond the capacity of State or local Government. The Australian Government needs to take a national perspective in relation to heritage funding, which includes places at all levels of significance. Governments at all levels have a role in funding publications and education programs to dispel myths and misinformation that contribute to market failure. (sub. DR242, p. 14)

Australia ICOMOS (sub. 122, p. 82) also argued that the Australian Government's focus was too narrow, that no over-arching strategy had emerged and that the Australian Government had not yet encouraged a consistent approach between all States and Territories. The National Cultural Heritage Forum (sub. 126, p. 3) argued that an integrated national heritage policy was required to address the disparity between statutory arrangements in the various jurisdictions and should specifically include minimum standards and practice benchmarks.

In saying that, however, the 2001 EPBC Act amendments have resulted in greater protection for nationally-iconic heritage places than was possible under the previous RNE system. The new Australian Government system, which has the potential to focus on 'conservation by agreement', should result in greater conservation outcomes than 'conservation by force'. Indeed, rigorous selection of places, on a priority bases, and a focus on negotiated outcomes could be seen as examples of national leadership by the Australian Government, and a model which State, Territory and local governments could adopt. However, the extent of the Australian Government's use of negotiated agreements is not yet fully implemented.

4.2 State and Territory heritage legislation

All State and Territory governments have legislation which specifically deals with the conservation of historic heritage places (table 4.1). These statutes are separate from legislation dealing with natural and indigenous heritage conservation, and some have separate legislation governing movable heritage and shipwrecks.

Most jurisdictions, in their Local Government and/or Planning Acts, include a requirement for local councils to take account of heritage values in their planning decisions. Local council discretion over planning and heritage is often guided by State government controls. These provisions are looked at in more detail in chapter 5.

Table 4.1 Principle heritage legislation

<i>State</i>	<i>Natural</i>	<i>Indigenous</i>	<i>Historic heritage</i>	<i>Movable</i>	<i>Shipwrecks</i>	<i>Heritage Council</i>	<i>State/Territory National Trust</i>
Cwth	Environment Protection and Biodiversity Conservation Act 1999	Environment Protection and Biodiversity Conservation Act 1999	Environment Protection and Biodiversity Conservation Act 1999	Protection of Movable Cultural Heritage Act 1986	Historic Shipwrecks Act 1976	Australian Heritage Council Act 2003	na
NSW	National Parks and Wildlife Act 1974	Heritage Act 1977	Heritage Act 1977 Historic Houses Act 1971	Heritage Act 1977	Heritage Act 1977	Heritage Act 1977	National Trust of Australia (NSW) Act 1990
Vic	National Parks Act 1975 Parks Victoria Act 1998	Archaeological and Aboriginal Relics Preservation Act 1972	Heritage Act 1995	Heritage Act 1995	Heritage Act 1995	Heritage Act 1995	na
Qld	Nature Conservation Act 1992	Aboriginal Cultural Heritage Act 2003;	Queensland Heritage Act 1992	Queensland Heritage Act 1992	Queensland Heritage Act 1992	Queensland Heritage Act 1992	National Trust of Queensland Act 1963
WA	Conservation and Land Management Act 1984	Heritage of Western Australia Act 1990	Heritage of Western Australia Act 1990	Heritage of Western Australia Act 1990	Maritime Archaeology Act 1973	Heritage of Western Australia Act 1990	National Trust of Australia (WA) Act 1964

(continued next page)

Table 4.1 (continued)

<i>State</i>	<i>Natural</i>	<i>Indigenous</i>	<i>Historic heritage</i>	<i>Movable</i>	<i>Shipwrecks</i>	<i>Heritage Council</i>	<i>State/Territory National Trust</i>
SA	Native Vegetation Act 1991	The Aboriginal Heritage Act 1988	Heritage Act 1993	Heritage Act 1993	Historic Shipwrecks Act 1981	Heritage Act 1993	National Trust of South Australia Act 1953
Tas	Nature Conservation Act 2002	Aboriginal Relics Act 1975	Historic Cultural Heritage Act 1995	Historic Cultural Heritage Act 1995	Historic Cultural Heritage Act 1995	Historic Cultural Heritage Act 1995	National Trust of Australia (Tasmania) Act 1975
NT	Territory Parks and Wildlife Conservation Act	Northern Territory Aboriginal Sacred Sites Act 1989	Heritage Conservation Act 1991	Heritage Conservation Act 1991	Heritage Conservation Act 1991	Heritage Conservation Act 1991	National Trust (Northern Territory) Act 1976
ACT	Nature Conservation Act 1980	Heritage Act 2004	Heritage Act 2004	Heritage Act 2004	Heritage Act 2004	Heritage Act 2004	na

Only Victoria and the ACT do not have legislation establishing and covering the activities and structure of the State and Territory National Trusts.

Heritage legislation, in all jurisdictions, establishes a similar set of institutions and mechanisms for meeting the objective of identifying and conserving State-significant historic heritage. These are:

- a register of historic heritage places (including criteria and procedures for identifying places for inclusion on the register);
- controls over the development of listed places (including obligations on owners to conserve heritage aspects and requirements to submit proposed changes for approval);
- the establishment of a Heritage Council (to manage the register, advise government and oversee the review of the heritage aspects of applications for changes to listed properties); and
- funding programs to assist conservation, by providing incentives to private owners of listed places, sometimes general and sometimes for specific works.

The States' and Territories' Heritage Acts have similar objectives (box 4.3). These objectives typically include the establishment of Heritage Councils and the introduction and maintenance of a register of State-significant heritage places. The objectives of the Acts also include the control over development of places listed in the register and the ability to enter into agreements with owners of listed properties. Some States also include specific reference to shipwrecks in their heritage legislation (table 4.1). The Northern Territory Act (s. 3) contains one general statement of objectives:

Box 4.3 Objectives of State heritage acts

- to provide for the establishment of the State Heritage Council;
- to provide for the maintenance of a register of places of significance to the State's cultural heritage;
- to regulate development of registered places;
- to provide for heritage agreements to encourage the conservation of registered places;
- provide for protection of shipwrecks and excavations; and
- provide appropriate powers of protection and enforcement.

The principal object of the Act is to provide a system for the identification, assessment, recording, conservation and protection of places and objects of prehistoric,

protohistoric, historic, social, aesthetic or scientific value, including geological structures, fossils, archaeological sites, ruins, buildings, gardens, landscapes, coastlines and plant and animal communities or ecosystems of the Territory.

In addition to the usual items included in its objectives, the Western Australian legislation also includes reference to facilitation of development which is harmonious with the cultural heritage of an area and to promote public awareness of historic heritage.

Definition of heritage

The various statutes define historic heritage slightly differently, but contain similar core elements. These elements include aesthetic, archaeological, architectural, technological, historical or social significance. Queensland and Western Australia also make specific reference to significance for past, present or future generations. The New South Wales Heritage Act distinguishes between State and local significance. An item can be both of State and local significance, and local significance may or may not also be State significance. A place may be on a State Register and a local heritage list for different reasons.⁷

For example, section 4A of the NSW Heritage Act states that:

“State heritage significance”, in relation to a place, building, work, relic, moveable object or precinct, means significance to the State in relation to the historical, scientific, cultural, social, archaeological, architectural, natural or aesthetic value of the item.

“Local heritage significance”, in relation to a place, building, work, relic, moveable object or precinct, means significance to an area in relation to the historical, scientific, cultural, social, archaeological, architectural, natural or aesthetic value of the item.

The Victorian Heritage Act states that ‘cultural heritage significance’ means aesthetic, archaeological, architectural, cultural, historical, scientific or social significance (s. 3, Heritage Act 1995).

Similarly, in Queensland heritage significance includes ‘its aesthetic, architectural, historical, scientific, social or technological significance to the present generation or past or future generations’ (s. 4, Queensland Heritage Act 1992).

⁷ For example, the Royal Exhibition Building in Melbourne is on World, National, State and local heritage lists, but for different reasons — its significance is different at each scale but exceptional at all scales.

Heritage Councils and Offices

The State and Territory statutes establish State Heritage Councils. These Councils typically either advise the relevant Minister on heritage issues — specifically the need to list certain places — or have the power themselves to enter places on the State Register. These Councils are made up 8–15 members with differing expertise. For example, members may be architectural experts, historical experts or development experts. Some States also allow Councils to make the heritage criteria rather than place such criteria in the legislation — for example, the New South Wales and Victorian Heritage Acts allow Councils to publish criteria based on specified indicators contained in the Act.

In addition to the Heritage Council, most States also provide for a secretariat body whose role is to assist and advise the Council⁸ — typically called the Heritage Office. While the role of these bodies differs between jurisdictions, they include administering the State Register and funding schemes, dealing with minor matters, and producing publications on heritage matters. In Victoria, the Executive Director of Heritage Victoria has primary responsibility for the administration of its Heritage Act — including determinations of permits and consents — and is also a member of the Heritage Council.

4.3 Registers of State significant heritage places

One of the fundamental aims of the heritage statutes is to provide for the establishment and maintenance of a register for the State's significant heritage places. These registers are the primary mechanism through which places with State-significant heritage values are to be identified, protected and conserved — similar to that described above for the National Heritage List.

Some States have a two-step process for entry onto the Heritage Register. That is, assessment by the Heritage Council and then listing by the Minister. The direct power of the Minister can also vary from the decision to list, or a power of veto. Other jurisdictions place sole responsibility in the Heritage Council to assess and list (see below).

The following outlines the criteria for entry onto the registers; the procedures for listing a place; whether areas can be listed in addition to individual places; and State controls over listed places. The incentives and financial support provided by States to listed properties are also examined.

⁸ In Queensland, Western Australia and South Australia this body is included in the Council itself.

Criteria for entry onto registers

Each State and Territory Heritage Act contains specific criteria for entry onto the relevant heritage register — or enables the relevant Heritage Council to develop and publish criteria. The criteria are broadly similar to the criteria listed in box 4.1. The Heritage Acts require that for a place to be listed it must meet, in the opinion of the relevant Heritage Council, one or more of the stated criteria. In South Australia, the courts have confirmed that a property can be listed even if it only meets one of the requirements (see *Protopapas Pty Ltd v State Heritage Authority* (1994) EDLR 274).

While the majority of criteria are similar across jurisdictions, some significant differences remain. For example, Victoria includes an additional criterion allowing the Heritage Council to consider any other matter which it thinks relevant to the determination of cultural heritage significance (s. 8(2) of *Heritage Act 1995* (Vic)). New South Wales and Queensland include a specific reference that a place can not be excluded on the ground that places with similar characteristics have already been entered in the register (s. 23 of the *Queensland Heritage Act 1992* (Qld) and NSW State Heritage Criteria).

Listing procedures

Most States and Territories (except New South Wales and Tasmania) allow any person or body to nominate an item to be listed. In New South Wales, listings can be initiated by the relevant Minister, Heritage Council, owner of the property or local governments. In Tasmania, only the Heritage Council can initiate the registration process — although advocates can lobby the Council.

Once the process is initiated, each jurisdiction has processes which vary from straight-forward to complex. In Victoria, Queensland and Tasmania it is the Heritage Council which decides upon listing places in the register. In New South Wales only the Minister, upon advice from the Heritage Council, may list places. The Minister also makes the decision to list in Western Australia. In South Australia the Minister may object to a listing on the basis that a listing is contrary to the public interest.

All States allow for a period of consultations and submissions after the initial decision by the Heritage Council that a place meets the heritage criteria. The Heritage Council must generally advertise and advise the owner and occupiers in writing of its intention to list a property. New South Wales, Victoria, Queensland and South Australia provide for hearings into the issue of listing.

Appealing the decision to list

Following the final decision on listing, most Heritage Acts allow for property owners and occupiers to appeal the decision made at first instance. These are either administrative appeals, judicial reviews (by a court or administrative appeals tribunal) or both. Western Australia does not allow appeals on the issue of listing a place on the register.

Administrative appeals (i.e., appeals to another bureaucratic body or the Minister) occur in New South Wales and Victoria. New South Wales provides for a Ministerial review and the establishment of a Commission of Inquiry. A similar process exists in Victoria.

Queensland and South Australia allow judicial appeals on the issue of the ‘cultural heritage significance’ of the place. This can have the affect of usurping the criteria listed in the statutes and allows the judiciary to determine its own definition of cultural heritage significance (McLeod 2005, p. 7102). In Tasmania, appeals against registration can only be made on the basis that the place does not satisfy any of the required criteria. The Northern Territory does not allow appeals on the merits of the decision to list. The ACT Heritage Act provides for merit reviews by the ACT Administrative Appeals Tribunal.

Notification requirements

All State and Territory Heritage Acts require that notification be given in a general manner through newspaper or gazettal. However, the extent of specific notice to property owners and occupiers differs across jurisdictions.

Queensland, South Australia, Tasmania and the Northern Territory all require that the Heritage Council must give notice to the owner (and occupier) of the decision to list. Queensland requires that reasons be provided, as well as owners’ rights of appeal. South Australia also requires that reasons be provided. Failure to give notice may result in invalidating the listing of the property.

New South Wales, Victoria, Western Australia and the ACT, while also requiring specific notice to be given to owners, only require that the Heritage Council does so as far as is practicable (or must use best endeavours). Both New South Wales and Victoria specifically do not allow appeals over failure to give proper notice. Appeals would be unlikely to succeed in Western Australia and the ACT due to the use of best endeavours requirement.

Can heritage areas be listed?

Heritage conservation of State-significant places typically focuses on individual places or properties. For example, the Victorian and Queensland Heritage Acts do not contain any specific provisions for the conservation of heritage areas.⁹ McLeod comments that in New South Wales:

The term “precinct” is used through out the Heritage Act and appears in the definition of “environmental heritage”. It is defined in s 4 to mean “an area, or part of an area, or any other part of the State”. It is not equivalent to the “heritage area” concept which forms part of heritage legislation in some other jurisdictions. (2005, p. 7130–1)

Some jurisdictions do allow for the preservation of historic precincts at the State level. Western Australia allows a precinct to be listed on the register, notwithstanding that each place within that precinct does not have such significance. The Tasmanian legislation also allows it to recognise heritage areas. Once declared, no work can be carried out in the area without permission from the Heritage Council. McLeod (2005, p. 7275–6) notes that this is problematic as it ‘confers effective planning authority’ on the Heritage Council and this conflicts with the policy of delegating planning to local authorities.

4.4 State controls over places listed on State Registers

All jurisdictions enforce controls over places that are listed on their heritage registers. These controls range from emergency stop orders to development controls (to a varying degree). Most jurisdictions also include provisions for appeals against decisions made by the Heritage Council.

Emergency controls over non-listed places

The traditional power of heritage legislation has been the ability to stop demolition of historic places and buildings (this flows from the experiences in the 1970s). For example, under the New South Wales Heritage Act, the Minister can issue an Interim Heritage Order (IHO) over a place of local or State significance when it appears that the place is under potential or real threat. Once an IHO is made, the property faces the same restrictions as if it was listed on the State Heritage Register. There is no right of appeal over the issuing on an IHO. Victoria, Queensland, Western Australia, South Australia, Tasmania and Northern Territory have similar

⁹ Heritage precincts can be conserved through the planning schemes and local significance conservation. See chapter 5.

provisions. In South Australia the issuing of an emergency protection order must be confirmed by the Environment, Resources and Development Court within four days. During the interim protection period, the relevant State Heritage Council must assess the heritage significance of the place and either enter it on the register or remove the interim order after a set period.

Development controls

All Heritage Acts contain some sort of control over the use and development of the land and buildings on properties listed on the State register. These controls also apply for places which have interim or emergency listings. There is no need to seek the owner's approval prior to imposing the controls.

The main consequence of heritage development controls is that they apply for activities which generally would not attract the need for development approval under the jurisdiction's planning and development laws (see appendix C for a detailed discussion of these laws). Another important difference is that it is usually the Heritage Council or Office that is the development authority (rather than the local government) for heritage places — or at a minimum, the development authority must seek the advice of the Heritage Council. That is, owners must seek permission from the Heritage Council for development on listed properties. For example, in Tasmania, all planning decisions over places listed on the State Heritage Register are made by the Tasmanian Heritage Council as well as local councils — this is directly at odds with the idea of an integrated planning system.

The Heritage Acts generally require the owner to gain approval for activities that results in:

- demolition of the building;
- damage to any part of the place, precinct or land;
- any development to the land on which the listed building or item is located, or which is located within a precinct;
- alterations to the building or place;
- the display of any notice or advertisement (signage) on the place, building or land; and
- removal or alteration of any tree or vegetation on the land, place or precinct.

The level of control over development varies across jurisdictions. For example, the New South Wales Heritage Act compels the Heritage Council to refuse any application to demolish the whole of a listed building unless it is dangerous or will be relocated to other land. The approval of development applications generally

depends on how the application would affect the heritage significance of the place. The level of legislative guidance on the factors to be considered also varies between jurisdiction. For example, the Victorian legislation compels the Executive Director to consider an application's effect on the heritage significance of the place as well as the effect on the reasonable and economic use of the place if the application is refused. The Queensland Act allows for the demolition of heritage places where there is no 'prudent or feasible alternative' (s. 36(8)). Western Australia has similar provisions. However, in Western Australia, the Heritage Council only provides advice, it does not make a decision. The final decision rests with Ministers, public authorities and local councils (see s. 78 of the Heritage Act, which provides that the Council must be asked advice prior to the making of a development decision).

In Tasmania a person must not carry out any works or development in relation to a registered place or a place within a heritage area which may affect the historic cultural heritage significance of the place unless the works are approved by the Heritage Council of Tasmania. This includes any physical intervention be it exterior or interior, demolition, subdivision, and construction of hoardings or signs.

FINDING 4.1

The listing of properties on a State or Territory Heritage Register results in the relevant Heritage Council becoming the de facto planning authority. This differs significantly from the approach to non-heritage places where the local council is generally the planning authority. This can result in the need for dual approvals for any proposed development.

Legislated exceptions from development approval

Some Heritage Acts (e.g., Queensland) contain legislated exemptions from the requirement to obtain development approval for certain types of works. Other Acts (e.g., Victoria and Tasmania) allow the Heritage Council to grant exemptions administratively (either individually or for a type of work). The Queensland Heritage Act allows the making of regulations to exempt certain actions. For example, the Queensland Heritage Regulation 1992 (Reg. No. 254 of 1992) excludes the following:

- emergency work;
- maintenance work;
- minor repair work;
- work that involves the replacement of small objects that;
 - will cause no detriment to the heritage significance;

-
- is not of significant scale; and
 - is reversible.

New South Wales and South Australia do not contain statutory exemption from the need to seek development approval for places listed on their State Heritage Register.

Maintenance and repair orders

In response to ‘demolition by neglect’, most Heritage Acts include a power for the responsible Minister, or the Heritage Council, to order an owner to conduct maintenance or repair on the listed property. For example, the New South Wales Heritage Act provides for the setting by regulation of minimum standards of maintenance and repair, and creates an offence of not maintaining a listed property up to those standards (standards are listed in Part 3 of the Heritage Regulation 1999).

The New South Wales Act also allows the Heritage Council to issue an order to an owner to remedy its failure to maintain the property (s. 120). If a person fails to follow the order, the Heritage Council may carry out the works and recover its costs. The same powers exist in Victoria.

Queensland, Western Australia, South Australia, Tasmania, and Northern Territory have power to order restoration. That is, if a person is convicted of non-approved development under the Heritage Act, he/she can be ordered to make good, to the satisfaction of the Minister, any damage done by their action. The Minister can also undertake the activity and recover costs from the owner.

Non-development orders

Both New South Wales and Victoria have power to impose non-development orders on properties whose owners fail to obey a maintenance order or which have been convicted of engaging in prohibited activities. Such orders can stop development for up to 10 years.

In Queensland, Western Australia, South Australia, and Tasmania a person contravening an order under the Heritage Act can also face non-development orders. These last for 10 years, except in Tasmania where it lasts for five years. Note that in these jurisdictions such orders cannot come from failure to maintain. The Northern Territory legislation does not contain such powers.

Certificate of immunity

In Queensland, South Australia and Tasmania, it is possible for an owner of a property to request that the Heritage Council issue a certificate of immunity. Such a certificate means that a place cannot be placed on the State Heritage Register within five years from the date of issue. If a statement is not issued, the Heritage Council has to provide the owner with reasons.

In New South Wales and Victoria, it is possible to ask for a certificate stating that a property is not subject to heritage controls or on the Heritage Register. However, such a certificate does not provide immunity for a future period.

Appeals against approval of works and orders

Jurisdictions differ as to what decisions are appealable. There are also different appeal mechanisms for approval of works and the making of orders.

Where the heritage administration is conducted by a body under the Council (such as the Heritage Office), generally any decision of that body is appealable to the Heritage Council of the jurisdiction. For example, in Victoria decisions made by the Executive Director are appealable to the Heritage Council — of which the Executive Director is an ex officio member.

In every jurisdiction, except the Northern Territory, the owners (or other people with appealable interests) have a right of appeal to the relevant Administrative Tribunal or Land Court. This can be different than the appeals mechanism provided for decisions relating to actual listing (see above). These appeals generally revolve around whether the decision to permit or prohibit proposed works would damage the heritage values of the property.

Penalties

In New South Wales the maximum penalty is a fine of 10 000 penalty units¹⁰ or six months imprisonment. Victoria has a maximum fine of 3000 penalty units. In Queensland, the maximum penalty is 17 000 penalty units. In Western Australia, failure to comply with a stop order attracts a penalty of \$10 000, plus \$1000 per day the works continue, and the possibility of up to two years imprisonment. In Tasmania, the maximum penalty for a corporation is \$1 million and \$500 000 for individuals.

¹⁰ Penalty units are currently \$110.

4.5 State and Territory government-owned heritage buildings

Unlike the Australian Government, State and Territory governments do not maintain a separate all-inclusive heritage list for government-owned properties. Government-owned heritage buildings that have State significance can be entered in the relevant State Heritage Registers. Buildings which are of local significance can be placed within the relevant local planning scheme (chapter 5). Some jurisdictions do have a separate requirement for government agencies to identify and conserve historic places that they own, operate, or manage.

New South Wales has the closest to an all-encompassing register of State owned heritage places, akin to the Commonwealth Heritage List. Section 170 of the Heritage Act 1977 requires agencies to identify, conserve and manage heritage assets owned, occupied or managed by that agency. Section 170 requires government agencies to keep a register of heritage items, which is called a Heritage and Conservation Register or more commonly, a s. 170 Register. State significant items identified in a s. 170 register are considered for listing on the State Heritage Register. Over 780 State significant government-owned items are listed on the State Heritage Register. All s. 170 Registers are searchable using the NSW online Heritage Inventory.

The NSW Heritage Office has published the *State Agency Heritage Guide* (NSW Heritage Office 2005). This guide outlines the State-owned heritage management principles (box 4.4). The aim of the principles is to ensure that the State Government is a model owner and conservator of historic heritage.

While Victoria and Western Australia do not have separate government-owned registers, both governments provide specific guidance to State agencies for the management and conservation of place listed either in the State Register or local planning schemes.

In Victoria it is the Department of Sustainability and Environment (DSE), rather than Heritage Victoria, that directly and indirectly manages many historic places in Victoria (but obviously not those still in use such as schools, hospitals and railway stations). The Department's management of historic places on public land is based on the Burra Charter. DSE relies upon the State Register and local planning schemes to identify and protect government properties. The State Heritage Register contains 631 public-owned places. The Heritage Act allows for the acquisition of heritage places:

The philosophy supporting [this] policy is that government acquisition is not desirable if the private sector is managing the place adequately and protecting its values. The

Victorian Government will only consider the acquisition of historic heritage places if it is essential to its survival. (sub. 184, p. 23)

Box 4.4 State-owned heritage management principles

1. *Heritage asset management strategy*
 - Each agency is required to have a strategy that implements the principles and guidelines outlined in this document.
2. *Identification of heritage assets*
3. *Lead by example*
 - The public sector should set the standard for the community in the management of heritage assets.
4. *Conservation outcomes*
 - State agencies should aim to conserve assets for operational purposes or to adaptively re-use assets in preference to alteration or demolition.
5. *Appropriate uses*
 - Heritage assets should, where feasible, continue to be maintained in their operational role.
6. *Maintenance of heritage assets*
 - Heritage assets are to be managed with the objective of preventing deterioration and avoiding the need for expensive ‘catch-up’ repairs.
7. *Transfer of ownership*
 - The transfer of ownership needs to be planned and executed so as to conserve the item’s significance.
8. *Management of redundant assets*
 - The management of heritage assets no longer in use should be planned and executed so as to conserve the item’s heritage significance.
9. *Monitor performance and condition*
10. *Reporting*
11. *Promotion*
 - State agencies should take every opportunity to celebrate and promote their heritage estate with the community.

Source: NSW Heritage Office (2005).

DSE has responsibility for approximately 150 redundant court houses, with equal numbers of other public buildings such as railway stations, police residences and school buildings. The Cultural Sites Network is being developed to help determine:

-
- places which may be over-represented and prioritise those for focusing funding and resources; and
 - where acquisitions may be appropriate to retrieve places which are inadequately represented.

The Network uses a thematic rather than an architectural approach as the basis for selecting sites. Using the Australian Heritage Commission's Principal Australian Historic Themes as a foundation, the following themes have been identified:

- Protection of Special Environments.
- Exploration and Survey.
- Exploitation of Natural Resources.
- Primary and Secondary Production.
- Tourism and Recreation.
- Communications.
- Migration.
- Settlements, Towns and Cities.
- Government Services and Institutions.
- Commemoration.

The Heritage Council of Western Australian (HCWA) has published guidance on government policy regarding the disposal of heritage assets (either through sale, lease or demolition). The WA Government is the largest owner of listed historic heritage in the State. Notification of a proposed disposal should be supplied to the Heritage Council a minimum of four months prior to placement of the property on the market, or prior to a proposed demolition.

Buildings and structures will generally need to be considered as part of this process if they:

- are 60 years old or more;
- are already listed on an existing heritage list such as a Municipal Inventory, or
- display other evidence of potential significance.

Where the HCWA concludes that the place requires special protection, a Conservation Plan and/or a Heritage Agreement is prepared.

The commitment to identify, conserve and manage publicly-owned historic heritage places varies considerably across State and Territory governments.

4.6 State incentives for owners of listed properties

The Heritage Acts provide for incentives to offset (at least partly) the costs imposed on owners of listed properties. The schemes focus primarily on agreements between the Heritage Councils and the owners. Such schemes grant the owner access to various forms of financial assistance (including tax rebates).

Heritage agreements/covenants

Heritage agreements (covenants in Victoria and Northern Territory) are agreements between the Heritage Council (or Minister) and the owner of a listed property. The various statutes allow a variety of elements to be included in such agreements, but generally they include the following:

- the conservation of the item;
- assistance for its conservation, in the form of financial, technical, professional or other advice;
- a valuation review (for land tax purposes);
- restrictions on the use of the land;
- requirements to carry out work, to a specified minimum standard;
- availability for public use; and
- charges for admission.

Typically, such agreements are attached to the title of the property and therefore also apply to future purchases. Generally, such agreements are enforceable through the Courts or Tribunals.¹¹

However, while Queensland allows heritage agreements, the Act does not contain any financial assistance to be provided as incentive for owners to enter into such

¹¹ Curiously, in New South Wales there is only provision for the Minister to seek an injunction in Court for breaches, not the property owner.

agreements — other than re-valuation of the land for land tax purposes (McLeod 2005, p. 7188).

In Western Australia, heritage agreements are available for properties that contribute to the overall sense of historic heritage significance, even though the individual property is not on the State Register.

Heritage agreements, however, are not the primary process through which jurisdictions impose heritage controls. For example, in New South Wales there are only three heritage agreements out of the 1498 places on the State Register. Similarly, the Northern Territory only has two heritage agreements out of 160 listed places.

Financial assistance for historic heritage places

All State and Territory governments provide financial assistance for the conservation and restoration of historic heritage places. Typically, explicit grant programs apply to private or not-for-profit owners of listed historic heritage places. The amount of direct annual funding ranges from \$100 000 in the ACT, to \$4.3 million in Western Australia (table 3.4).

Government agencies that own heritage places are the other main recipient of expenditure on heritage conservation. The aggregate level of expenditure provided to government-owned historic heritage places is difficult to calculate since departments and agencies are generally required to fund maintenance out of their own budget. However, some ‘iconic’ buildings can be clearly identified. For example, in 2005-06, the NSW Government has budgeted to spend around \$26 million on maintenance and capital grants for the Sydney Opera House. No jurisdiction has a budgetary requirement to separately identify the maintenance and capital expenditure on its own heritage places. This makes the identification of maintenance for heritage assets problematic. For example, the NSW Attorney-General will spend \$7.8 million in 2005-06 on maintenance for the Supreme Court, and District and Local Courts. However, it is not possible to establish how much will be spent on heritage-listed courts, or the additional cost of maintaining heritage values in Courts (whether listed or not) compared to normal routine maintenance.

The distinction between expenditure on privately and publicly owned places has been reduced in Victoria through the Victorian Heritage Program (VHP). Announced in the 2002-03 State Budget, the VHP was allocated \$8 million over two years. Grants are available to public and private owners of heritage places and not-for-profit community organisations which are supported by their relevant local

government agency. To be eligible, private owners must show how their project is of community benefit.

FINDING 4.3

The level of assistance provided to non-government owners of historic heritage places varies considerably across State and Territory governments. The level of expenditure on government-owned heritage places is difficult to calculate since no jurisdiction requires explicit budgetary recognition of such expenditure.

4.7 Views on the States' and Territories' heritage systems

Not surprisingly, the comments from many participants focused on the role of the States and Territories in the conservation of heritage places. While most participants supported the need for State and Territory controls over places with State-significant heritage values, several concerns were raised, including:

- the system for protection contains too many 'sticks' and not enough 'carrots';
- an unsystematic listing process;
- a lack of coordination between the Heritage Offices and Planning Departments; and
- governments fail to adequately conserve their own heritage.

Too many 'sticks', not enough 'carrots'

Many participants generally expressed the view that, if the community wants to conserve heritage places, and thereby place obligations and restrictions on owners to achieve this, then the community (through the various levels of government) should be prepared to compensate for the additional cost or loss of value from heritage listing — either through government assistance, or through private conservation agreements. Participants wondered why private owners should be penalised for a good which has much of its value captured in benefits to the wider public. Ivan McDonald Architects, in observing the imbalance between the 'sticks' and 'carrots' applied to historic heritage conservation, said:

I find owners of heritage places generally accept the concept of heritage conservation and the need for a regulatory and legislative regime to control conservation outcomes, ie. having the 'stick'. I even find people generally accept the 'stick' being wielded on them by way of compliance with heritage controls, even if they are inconvenienced or disadvantaged by more bureaucracy, more cost and more constraints on their private property rights. They accept this on the basis that there is a broad community benefit.

[However] ... I find owners of heritage places generally do not accept that they should have to bear the cost or be financially disadvantaged by achieving such community benefit. This is because there are effectively no ‘carrots’. (sub. 30, p. 1)

State and Territory governments rely on the use of legislative control rather than negotiating outcomes with owners of heritage properties, and rarely use the private conservation agreement powers in their Heritage Acts.

Unsystematic listing system

While accepting the essential role for State and Territory statutory listing, many participants observed that the identification and listing process for historic heritage places has been unsystematic, non-selective and did not take into account the cost of conservation. With the cost of conservation placed on owners, it was argued that there was little incentive for States and Territories to be selective and thus, the incentive was to list ‘too much’ — that is, all heritage items were eligible for listing, irrespective of the number already conserved or of the relative heritage value of individual places. In respect of privately-owned property, Ivan McDonald Architects observed that identification and listing was often contentious and, at times, highly adversarial and legalistic. They argued:

Ideally, heritage registers at all thresholds of significance should adequately (but not overly) represent a diverse range of places in a balanced, rational and methodologically-rigorous manner. ... One of the particular difficulties in achieving this ideal is the reliance, on the part of listing agencies, on receipt of nominations, often by someone other than the property owner. This is a reactive rather than proactive response and usually creates great angst for the property owner. (sub. 30, p. 4)

In regard to the historic heritage environment within Western Australia, Tom Perrigo (sub. 162, p. 1), CEO of the National Trust of WA, said the phrase that best described the current system was ‘confusion, controversy and conflict’. He noted there was confusion over the terms used — such as, ‘heritage significance’, ‘threshold’ and ‘heritage value’ — and that while the legislation focused on ‘values’, this was often overlooked with the practical focus being on ‘place’. Tom Perrigo concluded that:

... the entire process of identification and assessment is in urgent need of review and upgrade. The processes appear to be done without much objectivity, and without transparent, measurable, or defensible outcomes. (sub. 162, p. 2)

The Save Braidwood (NSW) group (sub. 113, p. 6) was of the opinion that as more heritage was listed, it became less rare, less valuable and more expensive to retain. In this regard, Graham Brooks and Associates (sub. 72, p. 6) agreed that there was inadequate comparison undertaken to ascertain the rarity or representativeness of

heritage items. He considered this was largely due to the lack of comprehensive information available about the entire heritage resources of a State, or of the nation as a whole.

Coordination between State bodies is a problem

The statutory recognition of State or Territory-wide heritage values results in the Heritage Office having either full, or part, control over the development and use of that property. Without such recognition, this role would largely fall to the local government level. This results in multiple approvals from both local governments and the State Heritage Office. At the extreme, heritage recognition transfers planning decisions from the local government to the Heritage Office (for example, Tasmania).

A number of participants were critical of the amount of duplication and overlap of heritage laws and processes between the three tiers of government. In particular, they argued that the uncertainty created by the interaction of heritage and local planning schemes resulted in wasted resources (in administration and expensive appeals processes) that could otherwise be directed towards the conservation of historic heritage places. For instance, Associate Professor Renate Howe (sub. 106) pointed to the need to improve the coordination between State Heritage Councils and other State planning bodies. Also the Shire of York said:

There is a need to consolidate legislation within and between the three spheres of government rather than the duplication and multiplication which currently exists. (sub. 57, p. 6)

Governments are poor conservers of heritage

A few participants suggested that governments were often poor managers of their own historic heritage places. For instance, while noting that State management was not the best, the Convict Trail Project said:

It appears the problems are related to the culture within the organisations where heritage is not the chief function of the organisation. (sub. 13, p. 6)

The Australian Council of National Trusts (sub. 40, p. 34) agreed that it was rare for government agencies and departments responsible for places of heritage value, where heritage was not a part of their core business, to be funded to care properly for them. Further, in regard to the care of de-commissioned government-owned heritage buildings, the Mechanics Institute of Victoria considered governments were conspicuously poor managers of such places and suggested that:

For both NGO and government owned/managed historic heritage places, the Commonwealth, State and local governments should adopt the same policy as for aged care — keep them in their houses as long as possible with assistance payments to the carers if necessary. (sub. 89, p. 6)

The Australian Council of National Trusts submitted that while State governments require their agencies to actively conserve their own heritage places, governments do not provide adequate funds for agencies to perform this ‘non-core’ function:

Governments must also exercise leadership in heritage conservation to the community. Government heritage agencies play a dual role in heritage conservation: the agency sets the rules for the community (including government agencies), and those agencies/departments that are responsible for heritage places should then abide by those rules: ie, they should be exemplary in their management of heritage places in their care.

However, because ‘heritage’ is core business for only a selected group of agencies, it is rare indeed for other agencies/departments, responsible for places of heritage value but not as part of their core business, to be funded to care properly for them.

For example, no extra funding has been allocated to those Commonwealth agencies that have heritage properties in their care, to assist them to meet the extra responsibilities imposed on them through the Commonwealth heritage listing process. (sub. 40, p. 32)

At the broad level, the system for heritage identification and conservation at the Australian or State and Territory levels are quite similar — two-stage listing system (the assessment and listing decision are separate) and the imposition of statutory controls once listed. However, there is a fundamental difference. The Australian Government proposes to use ‘conservation by agreement’ — mutually satisfactory heritage conservation agreements — although none have been made with non-government owners as yet. At the State and Territory government level, the use of such agreements varies from sporadic to negligible. There is little doubt among participants that focusing on ‘conservation by agreement’ would result in more beneficial conservation outcomes, provided there is a rigorous process for prioritising how limited funds should be spent.