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## 7 Assessing governments' involvement – conservation of privately-owned heritage

**This chapter provides an assessment of government involvement in the conservation of privately-owned historic heritage places. Overall, although the framework for heritage conservation has been improved in recent years with the adoption of a three-tier system for government intervention, significant deficiencies remain. Many participants expressed concerns about the current arrangements.**

**Governments, particularly at the State, Territory and local level, rely on proscriptive regulation to conserve historic heritage places. Inadequate consideration is given to the costs regulation can impose on owners to provide the wider community benefits that statutory listing seeks to protect. As a consequence, there are poor incentives to ensure that only places which provide a net community benefit are listed. In addition, inadequate conservation is occurring in some circumstances. The interaction of the planning system with heritage regulation can further exacerbate the costs imposed and limit transparency and accountability in the decision-making process.**

This chapter draws on the analysis presented in the preceding chapters, the description of planning regulation in appendix D and evidence provided by participants, to present an overall assessment of government intervention to conserve privately-owned historic heritage. Some guidelines for government intervention are first outlined to provide a framework for assessing how effective current government policies have been in achieving heritage conservation goals. The relative strengths and weaknesses of current government involvement are then discussed, with a particular focus on identifying potential areas for improvement.

### 7.1 Guidelines for government intervention

As discussed in chapter 6, the first step in assessing the need for government involvement is to establish if there are problems of a nature that warrant

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government intervention and, if so, whether intervention would produce a better outcome than inaction. The conclusion that the private sector has not undertaken as much heritage conservation as society as a whole desires, does not, of itself, justify government involvement. Government intervention to correct any shortfall should only be undertaken where the benefits of the intervention outweigh the costs and thereby result in a net benefit to the community.

The existing system for heritage conservation has been driven mainly by a perception that owners, if unregulated, would conserve too little historic heritage and that cooperative action by interested individuals and organisations, such as the National Trusts, would also be insufficient. In response to this concern, all Australian jurisdictions have now implemented heritage specific regulation, and some other policy actions, to protect places with officially recognised heritage values. However, several factors complicate the decision on whether, and how, governments should actually intervene.

First, as evident from information provided during the course of the inquiry, a large portion of heritage conservation is undertaken by individuals and communities operating in the market without resort to direct government involvement. For example, individuals and not-for-profit organisations, such as the National Trusts, purchase and manage heritage properties. Governments need to ensure that any action they might take does not constrain or undermine these private sector conservation efforts.

Second, heritage places are not homogenous — they vary in their level of significance to the community, authenticity, rarity and form. As a result, the benefits of retaining heritage values vary, as do the costs of providing them, for example, in terms of the impact on the value of a property. In many cases, property owners have normal commercial and private incentives to conserve the heritage values embodied in their property, but in some cases they do not. As private incentives vary on a case-by-case basis, so will the need for, and most appropriate type of, government intervention.

Third, the pressures on heritage places are equally diverse and can vary depending on location (chapter 2). For example, the main pressures on heritage places in growing urban areas may be demolition and redevelopment, whereas in declining rural areas, neglect or lack of identification are more likely to pose a threat to preservation. As the risks to heritage places are diverse, it may not be possible to simply target one or two specific causes or rely on a single policy instrument, such as regulation.

These characteristics of heritage mean that, even where there may be a shortfall between the level of heritage conservation that occurs voluntarily and the optimal

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level, the costs of government intervention may outweigh the benefits in some cases. This suggests that any government action should be based on careful analysis of the problem and the expected benefits and costs of addressing it. Ideally, the most appropriate time for such an assessment to occur would be after heritage significance has been assessed and before any regulatory control is applied.

In summary, while the nature of the cultural values provided by some heritage places may provide a rationale for government intervention, the method and extent of intervention will depend, in part, on the material nature of this problem for different places and the relative cost effectiveness of various policy options. The following criteria provide a basis for comparing and evaluating the suitability of different policy options for promoting heritage objectives.

### **Effectiveness**

A policy intervention is effective if it achieves heritage conservation goals. In order to judge effectiveness, it is important to assess the contribution that a policy instrument makes to meeting heritage objectives, beyond what would have occurred without it (put simply, does a policy instrument work?). At issue, for this inquiry, is whether government intervention through statutory listing and regulatory controls has effectively added to heritage conservation beyond the existing mechanisms available to individuals and communities (such as voluntary conservation and National Trusts) to address the market failure identified in chapter 6.

That said, some policy instruments will be more effective than others. An instrument that is well-targeted to addressing the underlying causes of market failure is likely to be more effective than one which is indirect. For instance, instruments that focus on particular risk factors, such as redevelopment, are unlikely to be effective in conserving those heritage places suffering from neglect. Equally, policy instruments that are used to achieve multiple objectives such as heritage conservation and town planning are likely to be less effective than dedicated and transparent instruments.

Statutory listing of historic heritage places is one means to preserve historic heritage — not an objective per se. The outcome that society seeks is a comprehensive and representative portfolio of places to be kept for posterity in good condition, well-managed and secure. Does the current system, with its reliance on regulation, deliver this? Or might modified policies and practices give better results?

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## Efficiency

Efficiency is fundamentally about ensuring individuals and groups in society achieve their goals at lowest possible cost. An activity is efficient if the benefits it provides exceed its costs (including all benefits and costs associated with social and environmental externalities) and there is no other use of the resources that would yield a higher value or net benefit for the community. Hence, a regulatory intervention is efficient if it effectively addresses a significant market failure to deliver a higher net benefit than the available alternative mechanisms.

Efficiency, at a practical level, means that policy action should be taken when it represents the most effective way of addressing an identified problem and minimises unnecessary compliance and other costs imposed on the community. For instance, imposing land-use restrictions on subdividable land is likely to impose significant costs on property owners and limit future use and enjoyment of the land, which would need to be justified by the heritage benefits generated and compared to alternative options. Similarly, if governments are providing assistance to property owners to provide heritage conservation, it is efficient to provide more assistance to those property owners providing higher benefits to the community. In these cases, policy options that can adapt to variations in costs and benefits across different places would be more efficient compared to uniform options.

## Equity

Equity, in terms of the distribution of costs and benefits of heritage policy, will be perceived differently by different stakeholders. However, policy options that are broadly considered to be equitable by those directly affected, and the community more generally, will encourage greater acceptance and compliance. Hence, perceived equity is an important consideration for evaluating policy options.

To enable decisions about the equity implications of different policy options, an important step is to evaluate the distribution of costs and benefits across affected parties. Perceptions of equity are particularly important for heritage conservation, as much of the costs of conservation are borne directly by property owners, while others in the community enjoy some of the benefits. Under these circumstances, perceptions of whether those bearing the costs have sufficient rights, including a recognition of private property rights, is essential to secure cooperation from property owners.

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## Good governance

Good governance requires a transparent and accountable institutional framework for managing and coordinating heritage policy instruments. In particular, decision making procedures should be transparent, non-discriminatory, contain an appeals process and minimise compliance costs. This type of ‘openness’ facilitates better decision making, encourages stakeholder confidence and acceptance of regulatory decisions, and garners support from the wider community.

Government decision making can be enhanced through the availability of accurate and timely information. Producing clear information on government expenditures on historic heritage conservation and the benefits that expenditure generates for the community, enables governments, parliaments and the general community to prioritise competing objectives and accurately assess performance against targets. For example, in a report to English Heritage, the Economics for the Environment Consultancy argued:

The conservation and enhancement of cultural heritage is typically viewed as a desirable undertaking. Preservation and study of cultural heritage contributes to overall social wellbeing through understanding and appreciation of the past and its legacy. Agencies and organisations tasked with protecting heritage from threats such as urbanisation, population growth, pollution, weather and climate, and even use by the general public, must compete for resources with other socially desirable goals. Given that resources are limited, priorities must be set among competing concerns both within and between sectors. (2005, p. 1)

## 7.2 How well are the existing arrangements working?

While there has been significant progress with the introduction of the three-tier legislative framework, in many instances other areas of heritage regulation, and particularly its application at the local government level, do not appear to be an effective, efficient or equitable means of achieving heritage conservation objectives — in fact, in some cases it seems to have been counterproductive.

### Overall policy framework

The three-tier framework established under the 1997 COAG Agreement, where each level of government retains primary responsibility for the related scale of heritage (national, State or local), has gone a considerable way to clarifying responsibilities and delineating the respective roles of the Australian, State, Territory and local governments. This framework allows a differentiated approach to government intervention in the conservation of heritage places that reflects the varying nature and scope of additional community benefits provided by heritage,

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and could easily be amended to account for the costs of conservation. However, there remains some potential for ambiguity and duplication, especially in relation to places that are represented on more than one list. There may be scope to more clearly define which jurisdiction has responsibility in these cases, or improve coordination for these listings.

Nevertheless, the Commission has not been presented with evidence to suggest that this is a significant issue or one that could not be resolved through cooperation and agreement under the existing intergovernmental agreement. In addition, some participants raised concerns about conserving places with multiple layers of heritage value, such as places with historic, natural and indigenous heritage characteristics. It appears that this issue could be similarly resolved through cooperation and coordination across governments and heritage agencies.

Separation of responsibilities under the three-tier framework is based on the principle of subsidiarity, which reflects the view that a function should be carried out by the lowest level of government able to exercise it effectively, and that each level of government is best placed to decide what places should be conserved for its community. It follows that, the power to list a heritage place should be aligned with the responsibility for ensuring its subsequent conservation and management is satisfactory, including providing resources for conservation where warranted. Linking government powers with the responsibility for outcomes (and any mutually agreed assistance) would impose a financial discipline on governments to make sound conservation decisions on behalf of the community they represent.

Many participants recommended that the Australian Government should have primary responsibility for funding heritage conservation. However, this would be inconsistent with the rationale underlying the three-tier legislative framework and the responsibilities and accountabilities built into that framework. Moreover, separating statutory responsibility for heritage conservation from the source of funding would reduce accountability for conservation outcomes.

As a general principle, that part of the community that benefits from retaining a heritage place should bear the costs of its conservation. For example, where the New South Wales community is the primary beneficiary from the conservation of a State significant place, then that community, through the State Government, should be responsible for meeting relevant conservation costs. This suggests that there should be an alignment between the decision to list a historic heritage place (with potential restrictions on its use) and responsibility for its conservation, including providing supplementary resources where warranted.

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*The three-tier legislative framework is an appropriate model for government involvement in heritage conservation. It delineates the responsibility of each level of government for historic heritage conservation and aligns the scale of heritage significance with the appropriate level of government decision making.*

## **Register of the National Estate (RNE)**

The RNE has been retained under the new three-tier legislative framework, even though it does not specifically form part of the new arrangements and in some ways is incompatible with them. A range of views have been expressed by interested parties about the future role of the RNE. The Australian Heritage Council considers that it represents a useful catalogue of places which jurisdictions could draw upon in compiling their own historic heritage lists (sub. 118, p. 12). Since 2004, it has been putting places on the RNE which have been nominated for the National List but have not met the threshold of ‘outstanding heritage value to the nation’. In this way, the Council has signalled to the owners and to State, Territory and local authorities its view that these properties possess significant heritage values, but at a lower threshold.

However, the RNE is causing some confusion in the wider community, with some other interested parties unsure of its role.

The creation of a new listing ‘hierarchy’ with the Commonwealth focussed on places of national significance, has been compromised by the retention of the old ‘Register of the National Estate’. This has perpetuated confusion over duplicated Commonwealth and State lists. (Heritage Council of Western Australia, sub. 59, p. 6)

Many members of the public expect that inclusion on the RNE provides some form of statutory protection. While the RNE does not have any such regulatory status at the national level (aside from ministerial obligations under the EPBC Act), it does have some implications at the State and local level through reference to the Register in some State legislation, and the occasional practice of referring to it in heritage-related judicial processes.

As agreement has been reached among the jurisdictions in Australia on the sharing of responsibilities for the identification, listing and protection of historic heritage places, there is now little policy reason for the retention of the RNE for historic heritage places. Each jurisdiction maintains a list or register of properties for which it has legislative or agreed responsibility, and the continuation of a list or register

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with no such status and with overlapping coverage can only add to confusion and uncertainty.

Many inquiry participants supported the removal of historic heritage places from the RNE with the retention of information in some form of database (for example, Chairs of the Heritage Councils of Australia and New Zealand sub. DR271, p. 26). Those that were opposed to any change emphasised the importance of the information contained in the RNE. For example, the Australian Council of National Trusts noted that the RNE remains the most complete source of data about heritage places in Australia (sub. DR237, p. 48). However, this important information can be retained by transferring it to a publicly available database. If the Australian Heritage Council wants to retain information about places determined to be unsuitable for the National Heritage List, it should be on that public database, not by adding to the RNE.

In order to solidify the new three-tier arrangements and remove any ambiguity:

- the Australian Government should remove all historic heritage places from the RNE and place the information in a national heritage database; and
- State and Territory governments should remove all references to the RNE from their planning and heritage legislation.

Although there are no statutory implications of retaining references to the RNE in legislation once historic heritage places are removed from the RNE, their removal would provide clarity.

The RNE would then contain only natural and indigenous heritage items and places. As and when mechanisms are developed to record such natural and indigenous places, those included on the RNE would migrate to those new comprehensive lists, after which time the RNE could be discontinued.

#### RECOMMENDATION 7.1

***The Australian Government should remove all historic heritage places from the Register of National Estate and transfer the information to a national heritage database. The database would need to be regularly updated and maintained, including the deletion of inappropriate listings.***

#### RECOMMENDATION 7.2

***State and Territory Governments should remove any references to the Register of the National Estate from their planning and heritage legislation and regulations, after ensuring that any places that meet the criteria have been recorded on the appropriate (State or local) heritage registers.***

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## Relationship between governments and community organisations

As noted earlier (chapter 1), the National Trusts have played a major part in the conservation of historic heritage places in Australia. However, the traditional role of such not-for-profit organisations in listing, protection and conservation of heritage places has largely been overtaken by various government bodies. Notwithstanding this development, in many States, the National Trust still retains statutory status. This creates confusion as to the role of the Trust, particularly in relation to the Heritage Council that each State and Territory has established. In addition, statutory status **may** diminish their effectiveness as an independent advocate for heritage conservation, and reduce their capacity as membership-based community organisations, to pursue their own objectives.

As a principle of good governance, governments in Australia now consider that entities should only be created and retained under statute where there are compelling reasons to do so — for example, where a government entity requires legislative functions and powers to achieve government objectives (Machinery of Government Taskforce 2001). The National Trusts neither form part of government nor require legislative powers to fulfil their role. This is demonstrated by the fact that the National Trust in Victoria has been operating as a private company limited by guarantee for 50 years. National Trusts in other states do not appear to be sufficiently different from the Victorian Trust, or other non-government organisations (NGO) such as Red Cross, to warrant specific legislation.

Legislative status is typically reserved for government bodies established to achieve government objectives for the entire community. Although NGOs can play an important role in delivering on those government objectives, a ‘contract for service’ model, rather than statutory status, is the most appropriate mechanism to maintain transparency and accountability. Although a limited number of NGOs were established under statute in the past, criticisms of this model, and statutory arrangements more generally, include:

- lack of accountability for performance to government;
- lack of transparency and financial reporting obligations; and
- unclear or conflicting objectives.

It is in this context that the Western Australian Government has approved the repeal of the *National Trust of Australia (WA) Act 1964* and for the Trust to be established as a private company. The decision followed a report from the WA Auditor General, which found the Trust’s financial management procedures did not meet government reporting requirements (Office of the Auditor General 2001). A subsequent independent review found that the Minister for Heritage did not have

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necessary accountability and oversight of the Trust's operations for the Trust to remain under statute and the umbrella of the Western Australian Government. The Trust advised that if such accountability measures were introduced, it would directly impinge on its education and advocacy roles and would make the Trust ineligible for grants from several bodies (Logan 2005).

The Australian Council of National Trusts argued that the presence of statutory based Trusts internationally, such as in those in the United Kingdom, supported the retention of statutory status in Australia (DR237, p. 54). However, the National Trust in England and Wales retains its legislation as it has statutory rights on the future of National Trust properties, which are rights that do not apply in Australia.

Further, unlike the Trusts in Australia, which are independent NGOs, many of the Trusts in other jurisdictions are part of government. For example, the Historic Places Trust in New Zealand plays an equivalent role to Heritage Councils in Australia. The Historic Places Trust has functions and responsibilities under the *Historic Places Act 1993* and the *Resource Management Act 1991* to identify, list, protect and provide conservation grants to historic heritage places. Although the Trust was originally an NGO, the New Zealand Government enacted legislation for the Trust to become a crown entity in 2004, in order to enhance the Trust's governance arrangements and subject it to government accountability and reporting responsibilities (Tizard 2004).

The Australian Council of National Trusts also argued that Trusts should retain their legislative basis because, as part of government they are able to access a range of benefits, such as government insurance arrangements (sub. DR237, p. 54). However, there is little justification for the Trust to be classified as a government agency and receive benefits while retaining NGO status, especially when other NGOs cannot avail themselves of the same arrangements. In any event, the Trusts may be able pursue cost savings and benefits through other means, such as government programs for NGOs or community insurance programs.

#### FINDING 7.2

*There are no compelling reasons to retain the statutory status of the National Trusts, given the nature and extent of direct government involvement in historic heritage conservation. Statutory status for the National Trusts lacks accountability and is inconsistent with best-practice government structures. It also erodes the independence for a non-government organisation.*

#### RECOMMENDATION 7.3

***Those State and Territory Governments that have specific legislation governing the operations of the National Trust should repeal such legislation.***

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A number of participants expressed the view that because of their membership interests, not-for-profit organisations, and in particular National Trusts, could be the most efficient vehicle for the delivery of government funding for heritage conservation. If this were to occur, regulatory governance would require them to develop appropriate transparency and auditing frameworks to be accountable for such government expenditure.

That said, the Commission is cognisant that the role and structure of the National Trusts are currently being reviewed by the Minter Ellison Consulting Group. The outcome of this review will inform the direction and future of the National Trusts.

### **Regulation as the main instrument to preserve heritage places**

Governments generally rely on regulation to list places identified as having heritage significance and impose regulatory controls to protect their heritage values. This is particularly the case at the State and Territory level (and the subsequent frameworks established for local governments). Throsby explained the appeal of regulatory instruments:

The reasons why hard regulation has been so popular as a tool in heritage policy-making have to do with its direct mode of operation and the apparent certainty of its effects. (1997, p. 21)

Despite the *prima facie* appeal of regulation as a simple and direct mechanism to preserve heritage places, over time, the fundamental criticism of the heritage conservation system has been the over-reliance on regulation to achieve conservation objectives. For example, in *Making Heritage Happen*, the Environment Protection and Heritage Council argued that the traditional singular focus on regulation had failed to encourage appropriate heritage conservation (box 7.1). A number of inquiry participants supported this view. Gordon Grimwade and Associates argued:

Heritage cannot be adequately protected by mere legislation. The more diverse the legislation that is in place, the more opportunities exist to challenge it, the more chance there is of confusion and the higher the cost of administration. Incentives and education would have more positive outcomes, and are probably comparable with administering the negative approach of the current compliance regimes. (sub. 174, p. 6)

The ACT Heritage Council expressed similar views:

When the methods of doing this [protecting heritage places] rely solely on restrictive regulation, ‘heritage’ is seen as an impediment to the free operation of the market and the maximising of returns. Heritage is seen as costly, and efforts are put into avoiding heritage identification or control. Governments have tried in many ways to diffuse this oppositional approach by negotiating rather than regulating, and by implementing

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various financial support schemes. However, these have been fragmentary and have not kept pace with the rate of regulatory development, and as a result have not had much impact on the property owner's and developer's negative views of heritage control. (sub. 147, p. 11)

**Box 7.1      Comments from 'Making Heritage Happen' on the reliance on regulation**

In an environment with limited resources, regulation may appear attractive because it appears relatively 'cost free'. Governments can simply 'require someone to do something'. That may be the reason that regulation has traditionally been the predominant conservation tool in some countries, including Australia. (p. 3)

It is estimated that on current trends a substantial part of Australia's remaining historic heritage will be lost through demolition and neglect between now and 2024 (perhaps as much as 10-15%). (p. 2)

Australia's public investment in incentives for historic heritage compares unfavourably with that of a number of western countries, particularly in North America & Western Europe. (p. 39)

An effective heritage system is founded on a balance of 'sticks and carrots'. The lack of a meaningful level of 'carrots' undermines support from property owners for the system, makes regulation more difficult, and misses opportunities for garnering private investment. (p. 3)

*Source: Environment Protection and Heritage Council (2004), Making Heritage Happen.*

In contrast, some inquiry participants argued that more proscriptive regulation and onerous enforcement provisions, rather than less, would improve heritage outcomes. For example, the Local Government Association of New South Wales argued that local governments should be granted additional powers to force property owners to maintain and repair heritage properties (sub. 179, p. 3).

Regulation should target the underlying problem it is trying to alleviate, and not just treat symptoms of the problem. The current regimes tend to regulate listing and planning approval as an end in itself, rather than as a means to promote heritage conservation of benefit to the community. As highlighted by the Goulburn Mulwaree Council:

The system is antiquated with its focus on property restrictions ranging from roof pitch, window styles, paint and colour requirements. The system of statutory controls consumes by far the greatest amount of resources for the organisation. In addition it is a blanket style control in which all properties within the Heritage Conservation Area, regardless of heritage value, are affected by the controls and individual heritage buildings receive little recognition and are not supported by clear statements of significance. (sub. DR301, p. 2)

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Increasing statutory powers in these circumstances would not address the underlying problem — that many private owners of historic heritage places are expected to bear the cost of maintaining heritage values for the benefit of the community. Without a corresponding change in the incentive to conserve heritage places, the Commission is not convinced that additional ‘heavy handed’ restrictions would necessarily improve conservation outcomes.

The current arrangements for heritage conservation are based on proscriptive regulation. This type of regulation has three main characteristics: it attempts to change behaviour of individuals by detailing how regulated entities should act; it relies on government monitoring to detect non-compliance; and it imposes punitive sanctions, such as fines, if the regulations are not complied with (ORR 1998 p. E14). In general, regulation based on these ‘command and control’ instruments is most suitable for addressing standardised, well-defined and stable problems. Clearly, the conservation of heritage places does not display these characteristics — the benefits and costs of conservation vary markedly across individual properties and for different public, commercial and residential owners.

Further, prescriptive regulation tends to be more effective in prohibiting certain behaviours, rather than encouraging positive actions. This is particularly true of heritage regulation, which often focuses narrowly on controlling development as opposed to improving overall heritage outcomes. This is unlikely to encourage owners to take the active and pre-emptive steps necessary to ensure conservation in the longer term.

Ultimately, this type of ‘hard’ regulation is a crude tool. Regulation is redundant where owners voluntarily conserve because they have normal private and commercial incentives to do so, and effective only in controlling active demolition or modification where the owner sees that as more valuable than retention. Where regulation imposes high costs and reduces the private value to a property owner, the incentive to conserve heritage values is further reduced. The prospective private loss creates an incentive to circumvent the regulations (after taking into account the risks of being caught and penalised) or to destroy the heritage value of the property before regulation is applied (see box 7.2). Where this is the case, policy options that give property owners an incentive to recognise and protect heritage values may deliver better outcomes than regulation that merely prohibits certain actions, such as development and neglect.

FINDING 7.3

*At the State, Territory and local government levels, there is an over-reliance on proscriptive regulation to achieve heritage conservation objectives. In many cases, this has led to poor outcomes, through for example, inappropriate listing imposing*

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*unwarranted costs (such as denial of redevelopment opportunity where otherwise permitted) and possibly perverse effects (such as destruction to avoid maintenance costs). In addition, proscriptive regulation fails to address abandonment of heritage assets or passive 'demolition by neglect'.*

### **Box 7.2 Regulatory controls and adverse conservation outcomes**

In discussing whether an owner of a heritage place has an obligation or 'duty of care' to conserve heritage values, the Chairman of the Australian Council of National Trusts, noted:

If that duty of care today is a draconian control — the reason I say it's with us today is another conversation I had at a meeting of the Pastoralists Association of Western Darling. I went to their annual meeting three weeks ago, and at lunch was the whole cluster of graziers, representing about 15 properties. What they were saying to a newcomer in their midst was, "Whatever you do, if you happen to find an Aboriginal relic, bury it and don't tell anyone". (trans., p. 396)

The Australian Heritage Institute noted that land-use restrictions can encourage perverse conservation outcomes:

The problem with demolition by neglect is sometimes it's benign and sometimes it's actually supervised neglect. By that I mean that the building is deliberately allowed to run down and then the costs of refurbishment are used as the basis for the development application. (trans., p. 1039)

The Municipal Association of Victoria expressed similar views:

There are examples of weaknesses in this model where the heritage building has placed too many constraints on the commercial operation. Wilful neglect of a heritage building in order to overcome responsibilities to maintain the building to a reasonable state has occurred previously — a possible example being Pentridge Prison in Victoria where a termite infestation went untreated until a wall collapsed. (sub. 66, p. 4)

The Professional Historians' Association provided an example where the threat of heritage listing lead to the pre-emptive destruction of a place:

The Sheoaks was a house set on almost one hectare of land overlooking the picturesque Pittwater in Sydney. ... The NSW Planning Minister authorised an Interim Heritage Order for 12 months to allow its heritage potential to be properly assessed. ... The house was burned to the ground overnight, destroying the heritage fabric and causing a significant immediate environmental danger to neighbouring properties due to asbestos contamination. (sub. DR306, p. 40)

Alan Anderson argued:

... owners have an incentive to act pre-emptively. Every historical structure is a potential liability. Accordingly, it makes sense to conceal or destroy the structure before those pesky heritage people list it. The system perversely discourages private preservation. (sub. 185, p. 2)

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## Identification and listing process

Governments have come relatively late to intervening in historic heritage conservation. In so doing, the foundation of official lists (with associated government regulation) were often lists developed by the National Trusts. Typically, a government heritage agency would adopt the National Trust list of heritage buildings as the core of its list, adding to it over the subsequent years. In addition, governments typically adopted the heritage professionals' criteria for identifying heritage places (criteria based on the Burra Charter). This history has influenced the composition (representativeness) of the lists and encouraged an unconstrained growth over time.

The introduction of statutory registers changed 'listing' from an 'information or inventory' tool providing public recognition for places of heritage significance, to a system of registration coupled with regulatory controls. The coupling of 'informational content' and 'action content' means that listing is no longer a neutral catalogue. The traditional listing process, based on the Burra Charter, provides best-practice principles for identifying heritage significance and conservation; it was not set up as an objective means of deciding which heritage places were best to conserve and at what cost. In other words, the heritage assessment process was designed to assess significance, not whether the community benefit provided by a heritage place justifies the added costs imposed by regulation. This suggests a need for more than just a single-stage decision making process, one which is expanded to include:

- the preparation of a statement of significance based on the Burra Charter; **and**
- an assessment of the wider benefits and costs of imposing statutory controls on a place assessed as significant.

### *The benefits of heritage conservation are not rigorously assessed*

The benefits of imposing statutory protection on a particular place are not always well assessed, primarily because the process for assessment is inevitably subjective:

- the criteria for listing are 'open-ended' and subjective (there is some scope for confusing community nostalgia or amenity for heritage value);
- heritage professionals undertaking an assessment may have (legitimate) differences in professional opinion, which in turn may diverge significantly from the valuation of the wider community; and
- the threshold for listing, and hence regulating, a heritage place is set relatively low in that it only need meet one criterion, and at a moderate level of significance, to be listed (see chapter 5).

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Comparative assessment or gradation of the significance of a heritage place appears to be rigorous at the national level, prevalent at the State level, but often limited or absent at the local level. Under the current assessment process, the benefits arising from heritage conservation are often assumed to be standard across individual properties. For instance, no account is taken of the additional benefits of conserving a rare or particularly representative example of a style or era. Similarly, whether many examples of a certain type of heritage asset have already been listed is not considered. Indeed, some jurisdictions specifically state that what is already listed and protected cannot be taken into account when a new place is considered for listing (Queensland Heritage Act 1992, s. 23(2); Heritage of Western Australia Act 1990, s. 47(2)).

Further, statutory lists are still regarded as a ‘cataloguing tool’ and are rarely systematically reviewed to assess whether those places listed best meet heritage conservation objectives. The consequence is that certain types of heritage places may be well represented, even over represented, while other classes of heritage places may be poorly represented on heritage lists. This is best exemplified by the predilection towards protecting places with high aesthetic appeal (such as sandstone buildings), as opposed to those with less aesthetic appeal, but perhaps equal heritage value (such as miners’ cottages).

Many governments are committed to a rigorous and transparent assessment process and the preparation of statements of significance (see for example, City of Port Phillip, sub. DR240; Mosman Municipal Council, sub. DR324; Town of Vincent sub. DR305). However, this is far from universal.

Australia ICOMOS noted that places are sometimes listed without a statement of significance:

... I can speak with some knowledge of Tasmania, where there are a lot of places listed without a statement of significance or with one that is done in a particularly cursory manner. The upshot of that for the owner is that when they make an application to change the place, the team at Heritage Tasmania understandably rushes around to do a proper assessment and then says, “Well, no, we can’t approve this because it is inconsistent with the values we’ve just identified”. (DR trans., p. 611)

Tom Perrigo argued that even when statements of significance are prepared they often lack rigour:

... 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)

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Similarly, the Tasmanian Government said:

The subjectivity and complexity of the heritage listing system across the States and Territories creates confusion and is a disincentive for owners to either purchase and conserve heritage listed sites or buildings, or move to have them listed. (sub. 136, p. 11)

Indeed, it appears that the issues of subjectivity and rigour in heritage assessment are not confined to Australia and are a feature in other jurisdictions. Michael Houser, architectural historian and National and State Register Program Director for the State of Washington, voiced the opinion that the heritage assessment process merely required “creative writing”:

Assuming a property has the necessary physical integrity, any property whose nomination is written well enough” he said “can make it onto the register; all it requires is little more than, ‘This property is a great example of a representative type’. (quoted in Schuster 2002, p. 10)

Especially at the local government level, there can be minimal guidance and rigour in the assessment process. As there is no statutory obligation to include a statement of heritage significance when listing, there are cases where a statement of significance is not prepared and examples of ‘drive-by’ listing or superficial assessment — for example, the statement is limited to ‘the place is of municipal significance’. Often heritage values are only assessed when an application for development is forthcoming. Despite this, standardised restrictions automatically apply to the property on listing, which may not relate well to the specific heritage values of a place. This creates considerable uncertainty and cost for some property owners, and threatens the integrity and credibility of the whole listing process at the local level.

*Costs are not considered when decisions on protection are made*

The most deficient aspect of the current listing process is that there is no connection between the assessment of beneficial heritage attributes for listing and the responsibility for (and cost of) managing a heritage place to conserve those attributes. The conservation of a property’s heritage values does involve costs. In many cases these are costs that would be incurred in the normal course of ownership and occupation of a property and are not a result of any obligations placed on owners because of heritage listing. In some cases, however, heritage protection will impose costs that would not otherwise be incurred by the owner, including:

- the additional administrative costs associated with complying with heritage regulation; and

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- higher maintenance or restoration costs associated with maintaining the property's heritage integrity (that would not otherwise be undertaken).

There are also costs associated with forgone opportunities (where listing restricts the ability to put property to its most efficient use) including:

- limitations on the ability to modify or adapt the property to modern living expectations or modern business use (or high costs to make such changes); and
- limitation on the ability to develop the site on which the heritage property is located (in areas where this would otherwise be allowed).

These costs are real and significant for some property owners (box 7.3). At the extreme, the heritage place may be of a nature where no realistic current use is available, imposing maintenance costs on owners while precluding such use that would balance the costs involved (e.g., churches with declining congregations and redundant infrastructure such as some lighthouses, timber bridges and old gasworks).

Under the current regulatory process, there is no requirement to take into account any costs that may be imposed on owners as a result of listing. While some governments have provision to do so, and a few governments do, most regard such costs as a subsequent management issue for owners. This implicitly assumes that the identified community benefits would always outweigh the added conservation costs. This is unlikely to be true in all circumstances, and where it is, raises a second question of whether it is efficient and equitable to impose such costs on owners. Clearly, where the costs are small it may not be unreasonable. However, if such costs are large and provide few, if any, private benefits to the owner, imposing them is unlikely to result in effective conservation outcomes.

#### *Willingness of private owners to bear costs vary*

The willingness and ability of private owners to bear conservation costs varies greatly, reflecting the wide range of properties involved and the nature of their heritage characteristics. In many cases, owners value the heritage characteristics of their property and willingly bear the cost of maintaining and restoring their heritage characteristics and features. Indeed, some would do so whether obligations were placed on them through heritage listing or not. In such cases, the heritage characteristics of the property are considered an asset rather than a burden, with listing imposing few unwelcome obligations other than the expense (sometimes non-trivial) of the administrative requirements associated with compliance.

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### Box 7.3 Cost of heritage listing

Don Brew highlighted the additional maintenance costs of conserving a heritage property:

... I just went through in replacing a slate roof and doing some joinery work, I think I spent something like \$70,000 to \$80,000. In a straightforward house that would have been maybe 30 or 40. So there is about a \$40,000 differential. You could almost say twice the cost just to maintain the house faithful to its original structure. (DR trans., p. 130)

The Property Owners Association of Victoria discussed the impact of listing in Stonnington:

In Stonnington, these heritage orders have seriously devalued the properties compared to previous real valuations by over 25% on average. The foremost valuer Herron Todd – an international firm – has ... measured the devaluations specifically for 300 properties in Malvern, and in many cases, the losses exceeded \$100,000 in 1998 dollars. After the mortgage, all their assets – gone. (sub. 134, p. 5)

A number of inquiry participants provided an independent valuation of the impact of listing on the value of their property. For example, Saman Rahmani:

I purchased this house in good faith in October 1998 with no indication of any potential heritage listing. This house was and is the perfect candidate for demolishing and rebuilding. I would never have purchased this house if there was the slightest hint that it would have heritage significance ... I have since obtained an official valuation for my property. It clearly indicates that if it becomes listed as a heritage item its value will drop by \$170,000. (sub. DR214, pp. 1,3)

Diana Anderson:

My Mother and Father worked very hard to buy the land and build the property which was completed in the early 50's. Dad has since died and Mum lives there alone. ... We had some independent Real Estate Agents value the property with and without the Heritage listing on it, and they estimate that Mum will lose approximately \$500,000 when she sells it, because of the heritage listing. (sub. DR202, p. 2)

David Miller, speaking about the Victor Harbour RSL Clubrooms:

We have had appraisals by two separate land agents in the local town; they have said that the value of the property with the heritage listing in place, as you see it now, is in the vicinity of \$500,000. If we didn't have the heritage listing on there, given that it's on the main boulevard right in front of the seashore, they start talking 1.2, 1.3, 1.4, 1.5 million dollars. (DR trans., p. 316)

John and Janet Boyd:

... we engaged the services of a fully qualified property surveyor at a cost of \$700. His valuation put the value without heritage listing at \$720,000, and with heritage listing at \$600,000, a reduction of \$120,000. (sub. DR373, p. 1)

But this is not always the case. Depending on the nature of the property and its location, obligations imposed as a result of heritage listing can represent a significant burden for the owner. It is in these cases where problems arise, including hostility and resistance to listing; a reluctance to undertake the necessary

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maintenance, sometimes leading to demolition by neglect; and generating a high level of enforcement cost. In fact, it appears that the vast majority of government and private conservation effort is expended to enforce a relatively small number of involuntary listings, not always for the most important and significant sites. Under such circumstances, it is difficult to see the heritage characteristics of the place being actively conserved in a way that would be necessary, or that the community would desire. Indeed, the protection provided by listing may serve to do little other than slow down the rate of loss, rather than positively conserving heritage characteristics into the future.

### *Impact on property owners and the community*

As currently structured, the costs imposed on owners are not considered at the time that a property is assessed and added to a statutory list, nor is the process of listing linked to the provision of assistance. That is, regulation of privately-owned heritage properties usually occurs without any right to assistance. Obligations and costs are nonetheless imposed on owners as a result of inclusion on a statutory list.

Potential inefficiency consequences of this process are that:

- so long as the parties benefiting from an increase in heritage conservation do not have to pay, they are likely to continue to press for further conservation effort until there are few benefits to be had. In other words, without the constraint imposed by having to pay the costs of heritage conservation, there may be continuing demands for ever greater provision of heritage, which would, at some point, impose a net social loss; and
- regulation of privately-owned heritage properties essentially asserts public ownership of heritage characteristics, with the owner then expected to manage the property. If there is an expectation that permission to modify or ‘upgrade’ a heritage property will not be granted, then the only way private owners have to retain ‘ownership’ and control of their property is to allow it to degrade or to modify or demolish before regulations (via listing) are imposed.

#### FINDING 7.4

*The current listing processes do not provide a mechanism for rigorously identifying the costs and benefits of conserving a place. Typically, the assessment process does not prioritise places according to heritage significance or conservation need, and little or no account is taken of the added costs of conservation when the decision is made to list a place and impose regulatory controls. As a consequence:*

- *some in the community have an incentive continually to seek more listings as they do not bear the costs of conservation; and*

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- *property owners can suffer an erosion of property rights and loss of value. As a result, they are unlikely to be as active in conserving heritage values and may, in some cases, have an incentive to degrade or destroy the heritage place.*

## **Assistance for conservation**

Assistance for the conservation of historic heritage places is provided by all levels of government in Australia. Chapter 3 and appendix B discuss current government programs. Grants are the most common form of assistance. Assistance is also provided through loans (including the use of revolving funds) provided by both State and local governments; concessional planning and zoning arrangements (including transferable development rights); and advisory services and technical assistance. State governments have negotiated heritage agreements with private owners on a range of issues relating to conservation, financial advice and assistance, restrictions on use, and maintenance requirements.

Despite these programs, the costs of conservation are borne overwhelmingly by the owners of heritage place, whether voluntarily or not. The Uniting Church in Australia, for one, noted that there was:

... growing community expectation that all heritage places should be retained and conserved by their respective owners for the greater public good, but without the wider community assisting in paying for these works. (sub. 76, p. i)

Adelaide Arcade argued that current incentives programs are insufficient and poorly targeted:

... the levels of the financial incentives have been erratic and minimal and therefore of no consequence in the decision making process of owners as to whether to commit funds to a project. (sub. 34, p. 2)

The Goulburn Mulwaree Council expressed a similar view:

... there is no question that the emphasis on legislative or regulatory controls to conserve heritage buildings has not been matched by the incentives and education components of its approach to heritage conservation. This is in part due to the lack of funding provided by higher levels of government and the restrictions placed on local government to raising revenue. (sub. DR301, p. 2)

A number of participants argued that even where grant programs are available, funding is largely directed towards government-owned properties or community-based projects, rather than identifying projects that would provide the greatest net benefit to the community (Uniting Church in Australia, sub. 76, p. iii).

For some, as illustrated by John Boyd in discussing the potential listing of his property, the assistance available would not offset the added costs of listing:

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The loss in value of our home would be around \$120,000. We are both pensioners and our home is the main asset we have to pay for any necessary moves and changes in lifestyle as we grow older. ... The slight reduction in council rates and the \$1000 offered every four years by council for maintenance, upkeep and improvements would be negligible compensation for our loss in property value. (trans., p. 943)

Ultimately, lack of targeted assistance has an adverse impact both on owners and on heritage places. The Environment Protection and Heritage Council commented:

Financial incentive programs remain very small at all levels of government, helping to fuel disenchantment or opposition amongst many property owners, of whom a growing number is affected by heritage regulation. This shortfall undermines the effectiveness of listing and regulation, adds to the growing pressure on the nation's stock of historic heritage places, and is reflected in the widespread loss of places through neglect and demolition. (2004, p. 1)

It appears that the current assistance available to owners of listed properties for heritage conservation is ad hoc, highly variable by jurisdiction, and in many cases falls well short of the additional costs of obligations imposed on owners as a result of listing. The absence of adequate assistance has a range of detrimental impacts on property owners and can result in the neglect or demolition of heritage properties.

While virtually all inquiry participants argued that there was a greater need for some form of assistance to encourage heritage conservation, a key point of divergence emerged on what the nature and extent of the assistance should be. Some favoured non-financial assistance, such as advisory services, while others advocated direct compensation to property owners for the imposition of heritage controls.

Diverse views were presented on the matters of property rights and compensation (see box 7.4). At one end, were those property owners who dispute that governments have any rights to impose controls on their freehold land without compensation. At the other end are those who argue that property owners have a 'duty of care' to conserve heritage values and, moreover, that governments have wide ranging powers to promote community objectives without compensation, and that these powers should be used for heritage conservation.

Whether or not (or under what circumstances) governments can force private owners to provide heritage conservation services without providing assistance is a moot point. The more pertinent issue, in the Commission's view, is whether a particular form of intervention (and the associated allocation of costs), on balance, is likely to have desirable or undesirable incentive, efficiency and equity consequences. In other words, given the problem at hand, what is likely to work best? At present governments appear to have the power to take or diminish private property rights via regulation without paying compensation, but this does not automatically imply that this is a desirable course of action. There may be smarter,

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more effective, efficient and equitable ways to achieve the desired heritage conservation outcomes. At the same time, government intervention cannot be ruled out simply because it may affect property rights.

**Box 7.4 Participant views on property rights and compensation**

The Australian Council of National Trusts stated that:

It should be noted that it is a myth that landowners have a common law right to do with their land as they wish. All land in Australia, with the exception of land subject to native title rights and interest, is held 'of the Crown'. In other words, all land titles in Australia ... are issued by the Crown (State and Territory governments), and the Crown guarantees the security of title and the priority of interests in the land through the Torrens Title system.

The Crown also retains power to impose restrictions on the ways in which the land/the property can be used or developed. Historically, these restrictions arose to protect public health and safety, and then increasingly to provide for public amenity. These restrictions have become more complex over time, and now cover, as well as heritage protection, ecological and sustainable development matters, and no doubt in the future will be expanded to cover other as yet unforeseen issues. (sub. 40, pp. 26–7)

Along similar lines, the National Trust of Australia (Victoria) see a problem in:

The general lack of understanding of the Crown's ... right to impose restrictions on land and property use or development for the wider public good, including the right to impose planning and heritage controls. (sub. 148, p. 5)

The Conservation Council of South Australia expressed an even stronger view:

Heritage listing must not be voluntary or depend upon funding for conservation. If a place is identified as a heritage place by a professional organization or committee, then the building must be listed in a register. If the value of a building is reduced as a result of heritage listing, the owner should not expect compensation for the loss of value. (sub. 84, p. 2)

In contrast, the Property Owners' Association of Victoria expressed a view that:

State and Federal Governments should ensure that where Conservation, Heritage or similar Orders of Restrictions on land usage are placed on privately owned property, adequate compensation must be paid to the registered owner in the same way as with other compulsory acquisitions and reservations. (sub. 134, p. 4)

Ivan McDonald Architects submitted:

At every level of government there is heritage regulation and control which politicians seem very happy to implement yet at no level of government is there sufficient or effective compensation or assistance for real costs incurred by the owners of heritage places for their conservation. (sub. 30, p. 3)

John Boyd argued:

In a nutshell, it seems to us that if Australia is really serious about preserving its heritage it is essential that it lay down rules and guidelines for adequate consultation with the public, and for the honest and fair compensation to those who are affected. Efforts to preserve our heritage may well be politically correct for the cultural elite, but without adequate financial and other compensation [for] people affected [it is] ... simply immoral. (trans., p. 946)

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The existing approach to heritage conservation, which has owners bearing the cost of conserving heritage properties with only minimal or variable assistance, has not been effective in all cases, and particularly where heritage values are under threat. Regulation has been considered successful where it imposes low costs and owners have normal commercial incentives to conserve heritage values. However, regulation has not been effective where it imposes high costs on property owners. The major problem in making owners bear these costs is that it necessitates compulsion. Yet prescriptive regulation is unlikely to promote a focus on heritage outcomes or the cooperation from owners necessary to achieve those outcomes. Nor is making a subset of owners bear the costs of providing services that benefit the rest of society particularly fair.

FINDING 7.5

*The assistance available to private owners of heritage properties is poorly targeted, and, in some cases, falls well short of the additional costs imposed on owners as a result of listing. In these circumstances, property owners will have little incentive to conserve actively heritage values.*

### **Local government involvement in heritage conservation and interaction with the planning system**

The exercise of local government powers for heritage conservation is perhaps the most controversial aspect of the current system. Local government heritage controls evoked a wide range of views from inquiry participants — at one end of the spectrum, there are concerns that the system could be misused to impose regulatory controls on places that do not have significant heritage values, while at the other end, there are concerns about a lack of listings and exercise of heritage regulation in some local government areas.

Problems at the local level are exacerbated by a number of specific features of local government:

- a lack of resources for heritage conservation, especially in rural areas;
- the widely variable heritage policies across local government areas — some councils take an active approach to developing a heritage list, while others do not have a single place on their list;
- the majority of locally significant heritage places are in private ownership, and in many cases, are residential dwellings and workplaces in daily usage;
- the benefits of heritage designation for places of local heritage significance are often finely balanced against the costs of conservation;

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- heritage regulation is complicated by the manner of its integration with the planning system and, in particular, with the development approval process; and
  - local governments often apply a heritage regime that was primarily devised to prevent the demolition of individual iconic places, to precincts or areas of lesser heritage significance.

The interaction between heritage regulation and the planning system is a major source of uncertainty and dispute. While local government heritage and planning systems differ significantly across States, especially with respect to the level of delegation and guidance provided to local governments, most local governments have broad-ranging regulatory powers for heritage conservation.

The main problems identified in chapter 5 were:

- to reduce the administrative costs of regulation, many local governments rely on the development approval process as a ‘gate keeping’ mechanism for heritage conservation, whereby registration and enforcement is only pursued after a development application is lodged. This shifts the entire cost, risk and uncertainty of heritage listing to property owners by imposing restrictions after investment decisions have been made;
- local governments have broad discretion and controls over properties listed in a heritage register or deemed to have heritage significance under the general planning provisions, which can create both internal pressure within councils and external pressure from residents to misuse heritage controls for other planning purposes; and
- when seeking development approval, owners of historic heritage places can face substantial compliance costs to meet additional requirements for heritage approval (such as heritage impact statements).

This situation is not unique to Australia. According to research conducted for English Heritage, an important reason for poor conservation outcomes at the local government level (although the principles have broader applicability) is a failure to understand what the conservation task is:

The overwhelming impression ... is of a conservation service that is often stretched, under-resourced and operating without many of the necessary ‘building blocks’ that would ensure an effective, efficient and balanced service. Too many authorities hold inadequate information about the extent, character and condition of the historic resource to be managed. This is likely to lead to a failure on the part of authorities to match resources with the scale of the challenge they face. Staffing levels are often modest in relation to the size of the resource to be managed and the workloads faced. Whilst it is clear that the majority of conservation specialists would claim to be covering a very wide range of activities, development control tasks invariably predominate at the expense of other important work. Consequently much of what might

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be regarded as essential best practice, such as buildings at risk work, conservation area appraisals, enforcement and other proactive tasks, inevitably receives comparatively low priority in many authorities. (Grover 2003, p. vii)

As a result of these features, the current treatment of heritage conservation under local government planning schemes lacks consistency and integrity, and is unlikely to facilitate regulatory decisions that result in the greatest net benefit for the community. It is therefore likely that greater transparency, rigour and accountability would improve both planning and heritage outcomes.

FINDING 7.6

*At the local government level, the handling of locally-significant heritage places, as part of local planning schemes is not working well, primarily because of:*

- *the imposition of unclear and uncertain restrictions on property owners;*
- *the failure to prepare a statement of significance for each place listed on a local list;*
- *inconsistent use and interpretation of heritage controls; and*
- *the application of heritage controls to places that have little, if any, heritage significance in order to achieve other planning objectives.*

In summary, legislation initially introduced to identify and control the demolition and modification of undeniably important heritage places has since been heavily relied upon to achieve on-going heritage conservation goals. This approach is unlikely to be the most effective way to conserve heritage in all cases, or to secure a valuable portfolio of heritage assets over the longer term. A greater transparency about the benefit–cost trade-off involved in providing heritage outcomes is required. This would facilitate better policy choices, through the explicit recognition of the costs of conservation and more effective prioritisation of community conservation goals.

The heavy emphasis placed on regulation results in circumstances where the private benefits of conservation are less than the costs. As a result, property owners have insufficient incentive to conserve heritage places and may, in some circumstances, have strong incentives to destroy heritage values to avoid regulation. If the conservation of heritage places can be made more compatible with the interests of property owners, then more conservation will occur voluntarily, and in a way that supports the long-term preservation of heritage values.

Given the shortcomings of the current system, there is significant scope for improvement in a number of areas. Subsequent chapters will explore ways in which the existing heritage system can be improved. In particular, they will make

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recommendations on how to more closely align the incentives of property owners with governments' and community heritage conservation objectives.

