

COMMENTS ON THE PRODUCTIVITY COMMISSION'S DRAFT REPORT ON THE CONSERVATION OF AUSTRALIA'S HISTORIC HERITAGE PLACES

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The following comments avoid matters of detail and seek to address what we regard as key general issues which emerge from the Draft Report. We set out a number of problems which we see as arising, and then propose some solutions to the problems.

A ISSUES AND PROBLEMS

THE RESPONSIBILITY OF GOVERNMENT TO PRESERVE OUR HERITAGE

As we said in *Managing Our Heritage*, governments have roles and responsibilities in heritage conservation. The Victorian Government has accepted responsibility by successive *Victorian Heritage Strategies*. The *Heritage Act 1995* provides for the protection and conservation of places and objects of cultural heritage significance and the registration of such places and objects.

Registration confirms the public identification of heritage places as being of cultural heritage significance. Under the Act a permit is required to carry out works at a heritage place which has been included in the Heritage Register. Conservation of registered places or objects is not provided for by the Act, other than the obligation imposed on an owner under S160 not to allow the place to fall into disrepair or fail to maintain it to the extent that its conservation is threatened; and the provisions for repair orders set out in the sections which follow.

The Heritage Act also recognizes that heritage places which are not of cultural heritage significance at the State level may be appropriately protected under a planning scheme or by steps under the *Planning and Environment Act 1987*. Planning authorities are usually Local Government Authorities. Many heritage places are subject to regulation by such Authorities.

The Draft Report proposes to replace the system under the *Heritage Act* with a regime whereby no place in private ownership would be included in the Heritage Register unless a conservation agreement was entered into. Under such a regime the owner of a heritage place could prevent registration by refusing to enter into an agreement.

The Draft Report proposals may assume that heritage places would continue to be identified and assessed as significant. As a matter of logic, identification and assessment must be prior to the negotiation and making of a conservation agreement providing for the long-term management of a heritage place.

The proposed change from statutory listing to voluntary heritage agreements implies a major shift in responsibility from the public sphere to the private sphere and thus shifts financial responsibility for heritage conservation away from governments. If the exercise of owners' rights of veto prevented the registration of significant heritage places, they would not receive the protection and conservation which the community expects governments to ensure. If, on the other hand, government payments induced large numbers of owners to enter into conservation agreements, the funds available for heritage protection would be diverted to benefiting private owners, without any increase in the conservation of heritage places and objects. It is difficult to assess whether the effects of such a regime would be positive or negative.

Governments are also owners of heritage places. This ownership confers a responsibility to understand, conserve and appropriately manage those heritage places. This does not always happen. Leading by example is as important as directing or negotiating with private owners to conserve places of significance. Governments should commit to being model owners.

RECOMMENDATIONS FAIL TO ACHIEVE THE CONSERVATION OF HERITAGE PLACES

In terms of heritage conservation, the effect of the Draft Report, if implemented, would significantly decrease the number of heritage places protected, by in effect, giving property owners a right of veto over the listing and protection of heritage places. However, it may be that many of the mechanisms for conserving our heritage places need to be improved, and additional tools developed. The Draft Report provides no evidence to support the assumption that the regime it proposes would increase the number and percentage of heritage places which were well preserved.

The Draft Report says, 'While the identification of heritage can be inherently subjective, classification of the degree of 'cultural significance' introduces an additional degree of subjectivity.'(p10) By this emphasis on subjectivity the Draft Report suggests that the identification and assessment of cultural heritage significance is problematic. Without an adequate survey of the extensive literature about the meaning of cultural heritageⁱ, the Draft Report seeks to adopt a market solution to the problem of defining heritage value: the heritage value of a property to a community is what the community is prepared to pay an owner for the preservation of that property. But there is no market for heritage value. The assessment of the economic value of heritage cannot be based on an actual market, but derived from a theoretical analysis. That analysis in turn involves difficult questions of meaning. Heritage values are not in themselves economic values. Under the Burra Charter, the assessment of heritage value does not involve economic assessment. The attempt to measure heritage in economic terms omits key aspects of why cultural heritage is important to our community.

ISSUES ARISING FROM VOLUNTARY HERITAGE AGREEMENTS

Owner's rights

The Draft Report asserts that heritage listing imposes a cost on property owners because they may lose development opportunities. There is a lack of evidence to support this proposition. The assumption of cost is based on an *a priori* analysis rather than any study of the actual costs and benefits of registration of heritage places. The *a priori* argument rests on an inadequate understanding of the rights of the owner of property in our society. Restrictions on development of heritage places do not interfere with property rights of owners. Such restrictions are part of the very legal system which establishes rights in property, without which system there are no property rights. Any legal system circumscribes in many ways what the owner of an interest in land can do. See Coase, R. 'The problem of social cost' (1960) 1-44 at p44. Development is circumscribed in many ways. Our legal system includes provisions to protect and conserve our cultural heritage. Under our system it is not appropriate to regard an inability to develop a heritage place as a cost imposed on the owner.

As noted above, to give owners rights of veto on heritage listing would seriously undermine heritage protection and over-emphasizes the 'rights' of owners over those of the community. Moreover, there is no evidence that the existing system requires property owners to incur costs to provide public benefits.

Consistency across levels of Government

The Draft Report seeks to deal with heritage places at every level of significance by the same mechanism. The systems in operation for identifying and conserving places of heritage significance currently vary according to the level of significance involved. There are several rather than one system. At the local level the systems vary from municipality to municipality, and are not the same as those at the state level. There are great differences in the financial resources available to different municipal authorities and to State Governments. Some municipalities cannot afford even to identify all the heritage places within their jurisdiction. The problems vary from system to system. Problems associated with Heritage Overlays under planning schemes do not occur with the system of registration under the Victorian Heritage Act. There is no basis for the 'one size fits all' approach adopted by the Draft Report.

A problem of consistency arises within the process of negotiating and setting in place agreements both across the three levels of government and from state to state. This consistency problem would affect a great volume of work, as State Government is the cornerstone of the majority of heritage protection (highlighted on p.191-192 of the Report). The transaction costs of the negotiation process would be high, and would diminish the already inadequate financial resources available for conservation of our cultural heritage.

Places which need protection at the Federal level are relatively few, often rather self-evident and frequently already in the hands of Government or a public institution such as a university, with whom negotiation may be relatively easy. They are usually already protected and do not occasion the bulk of the work of heritage conservation. What works for them may not apply to other levels of Government.

Places of state significance make up the bulk of the assessment and protection task. They are numerous, of good heritage value, and very diverse in nature, ranging from landscapes, archaeological sites, industrial sites to more conventional heritage buildings. How is consistency of process and outcomes across types of heritage places to be achieved? How is consistency across states to be achieved? What of geographical differences? How can these be built into a reliable and replicable system of heritage agreements?

The issue of scale is amplified in landscape protection. How does one negotiate an effective agreement across a historic landscape, where there are often a number of owners and the scale is large? This appears to be an area of conservation where conservation agreements would not work.

While heritage places of local significance are numerous, they have been judged to be of local value or of value to a minority group. This level may be the one where heritage agreements could be most open to abuse as heritage conservation operates at the local community level and involves local politics and identities. Conversely, given appropriate safeguards, this may be an effective tool at this level.

The gap in education of participants

Key elements of an effective agreement system require that appropriate identification and assessment have occurred. Both involve matters of judgment. Equality of bargaining power in making conservation agreements implies a level of education and a trained capacity to make decisions. A trained negotiator knows where to draw the line and has knowledge, both of heritage and of negotiating strategies. Such people were easier to find when there was a master-apprentice relationship within state government departments and within local government. Staff turnover and the relative youth and inexperience of many planners compared to those retained by persons proposing developments, makes the task harder. Further targeted education and training are needed.

Abuse of the system

It cannot be assumed that negotiated agreements would bring integrity and rigor (p.XXXII of Report). It could be argued that they open the system to bribery, vested interests, and rent seeking behaviour. However, negotiated agreements may end pre-emptive acts of vandalism.

The options available where negotiated agreements fail are weak. What are other possibilities?

Opportunists will look for the expiry or review of an agreement as a time for a dip in economic value. This may be analogous to, for instance, the end of a pastoral lease, where the uncertainty causes a diminution of value. In the Trust for Nature style of covenant, review is unusual and is triggered by a clear and observable change in natural heritage value. The covenant rides with the title and purchasers are aware of its binding nature.

Buying conservation covenants

Purchasing conservation covenants is done in the U.S., where they are known as easements. Once this approach is adopted, there is no going back, as everyone expects to be paid for entering an agreement. There will then be no capacity for unbiased voluntary easements, only a negotiation of how much they will cost. This was something the Trust for Nature has sought to avoid.

APPLICATION OF THE BURRA CHARTER

The Draft Report makes reference to the Burra Charter, but the key recommendation, which makes listing of heritage properties conditional on a voluntary conservation agreement being entered into, is inconsistent with the fundamental premise of the Burra Charter, that identification of the heritage significance of a place is logically prior to action to conserve it. The steps of identification (finding), assessing (judging), conservation (including managing) are distinct and sequential. The agreement of the current owner of a heritage place is not a relevant factor in determining whether a place is of cultural heritage significance. An agreement with the owner about managing the heritage place may well be useful, but should be confined to its proper role.

VALUATION OF HERITAGE BY COST BENEFIT ANALYSIS

Cost benefit analysis

In seeking to apply an economic value to heritage based on a cost benefit analysis, the report fails to recognise that the costs and benefits set out are attended with similar questions of definition to those surrounding heritage significance. For example, it is assumed that there are costs necessarily arising from heritage listing. Such costs on closer examination seem to be the loss of the expectation benefits of development. But the fancied value of development opportunity depends on many factors, and must always be subject to the constraints which form part of the laws regulating the community in which the development is to occur, including heritage protection.

No evidence has been given for the assertion that the maintenance costs of a heritage building are increased by registration. The costs of sustainable management of a building will be incurred whether or not the building is registered. There may be transaction costs associated with the preparation of a conservation policy for a heritage place, but they are

not such as to justify the setting up of a whole new system of conservation agreements, as is proposed.

Heritage value is in terms of the property market similar to the amenity of a neighbourhood. Like amenity it should be respected and protected by planning schemes. Development inconsistent with heritage values, like development inconsistent with the amenity of a neighbourhood should not be permitted.

As the draft report recognises, development must comply with planning requirements. Developers cannot expect to take the benefits of the system without the burdens. Community benefits such as amenity and heritage conservation underwrite the profits which developers seek by providing the setting for a development. Development which does not conserve heritage places seeks to benefit the developer by imposing detriment on the community and future generations. The developer's private gain is at the cost to the community of the loss of part of its cultural heritage.

It is an inherent feature of town planning that benefits and detriments fall on owners of land by reason of zoning and controls on development. Although it has been suggested from time to time that there ought to be compensation for detriments of the nature of loss of development opportunity suffered by private owners of land, the planning system does not provide for them. The community benefit provided by sound planning is not constrained by compensating owners for such detriments. Supposed expectation losses by reason of heritage registration should not be treated any differently.

It has been suggested that the high property rates set by local government authorities act as a mechanism to push redevelopment. The problem lies rather with the practices of land valuers. Valuation based on 'highest and best use' of land, rather than actual use, factors into valuations used by rating authorities potential development of the land. As is often demonstrated, such valuations and the rates and taxes which become payable by reason of them may make the current existing use unaffordable. The resulting developmental pressure creates many problems for local government authorities. It is not appropriate in a well managed society that land use and planning outcomes should be driven by 'highest and best use' valuation practices.

Intergenerational equity

The cost/benefit analysis has been undertaken in present day terms. However, heritage is also about saving places for the benefit of future generations. One can only make an educated guess as to the benefit for the future, while the costs are being borne today. It is similar to education, where the costs are borne at the point of gaining the education but the benefits are life-long.

The report gives insufficient attention to inter-generational equity. Heritage places are conserved for future generations as well as for existing community members. The preservation of our heritage for future generations is one of the key reasons for the

conservation of places of cultural heritage significance. Our heritage is part of the fabric of the civilisation which we seek to preserve for our descendants. Such values cannot readily be accommodated within a market based system (perhaps more accurately a 'virtual' market by economic analysis) such as that proposed.

Judging the value of heritage to the current community in cost benefit terms is fraught with problems. How does one evaluate its monetary value? Is the vocal minority a true representation of community value? How does one assess the true costs of conservation?

B POSSIBLE SOLUTIONS

In the following sections we consider some possible solutions to the problems we have discussed.

ADAPTING CONSERVATION TOOLS TO DIFFERENT TYPES OF HERITAGE PLACES

Not all tools for conservation work well for all types of heritage place. What may work for a building with one owner may not work for a landscape, archaeological site or industrial heritage site. This may be because there is a change in scale; some sites in these categories being very large, because there are a number of owners or because the site is unusual and difficult to assess. Tools may need to be adapted for these cases or new tools developed. In the case of heritage landscapes, for example, planning controls such as overlays and precinct controls seem to be essential tools. But they may need to be supplemented by additional controls and policies. The community consultation which such controls involve may be more important than obtaining individual conservation agreements.

If the three levels of Government (federal, state and municipal) are recognised as having their own heritage systems, it will be seen that different tools will be appropriate for each level. For example, there may be more scope for conservation agreements at the local municipal level than at the state level where a system of statutory registration should operate.

THE ROLE OF THE NATIONAL TRUST AND OTHER VOLUNTARY HERITAGE ORGANISATIONS

An important role can be played in heritage conservation by the National Trust and other community organizations. This may not be the traditional role but should be complementary to any new directions in heritage conservation from Government.

The National Trust should not, perhaps, be running registers while the State government does; but could remain vital in data collection and communication. In the current system,

this could result in nominations. In a future system it could result in identification and some level of assessment. They could alert Government to the need to protect certain types of heritage places or certain locales. With their expertise they would see across a range of heritage places and themes. They are an important heritage resource which it would be foolish to alienate.

It is tempting to see the National Trusts as the 'high moral ground' in heritage. However, their information and resources could be made more accessible to the community at large.

INFORMATION TRANSFER

One of the key problems in heritage is the mass of data stored in many places. Who knows what and how is the information communicated? The web may provide an answer. It is a messy system but allows for cross-referencing and excellent data access. The activity of data management may be one of the most important to organize, and one to which effort and funds should be directed, before identification and assessment systems are further dealt with.

MECHANISMS TO ACHIEVE CONSERVATION

It appears that the most robust and flexible system for conserving heritage places which have been identified and assessed would be one that offers incentives as well as controls; a carrot and stick approach. This offers several possibilities:

Easements or covenants

Easements or covenants are used in North America, New Zealand, and for nature conservation in Victoria. These examples could be examined and adapted for heritage place conservation. While unlikely to provide the whole answer, they could be useful.

Voluntary Heritage Agreements between owners and an authority

The management of heritage places after their identification and assessment could be assisted by negotiated conservation agreements with owners. There are various ways in which this tool could be used. For example:

Incentives in *parallel* with controls: an either/or situation. The owner could either negotiate an agreement to conserve with some benefits, or be required to conserve a place through some system such as the one in place in Victoria at present. The absence of financial benefits in the latter situation may encourage voluntary negotiated conservation.

Incentives in *series* with controls. First, a negotiated agreement is attempted and if this fails, statutory controls are applied. Both steps assume that the place has been assessed and found to be significant.

No doubt other ways to use conservation agreements could be devised.

Community and authority partnerships

In community/authority partnerships advice and appropriate funding could be provided by the authority and conservation effort by the community. This already occurs and the unpaid effort of volunteers should not be underestimated. We considered the important contribution to heritage conservation made by volunteers in *Managing Our Heritage*. That contribution should receive appropriate support from governments. None of this has been factored into the economic argument.

THE ROLE OF CHARITABLE FOUNDATIONS

As we explained in *Managing Our Heritage*, there is a role for a foundation or foundations in the conservation of heritage places. This may be the most effective form of tax relief for heritage conservation and could act as an important incentive. It is easy to administer once tax deductible status is obtained and the key point would be to argue that heritage place conservation is a worthy charitable sector and contributes to community and nation building.

CONCLUSION

These are just some of the ways in which a better system for conserving our cultural heritage could be developed. Any system must be fundamentally based upon sound identification and assessment of heritage places, followed by a selection of the appropriate tools to achieve sustainable conservation of them.

ⁱ See as a beginning, Aplin. G. *Heritage identification, conservation and management* (OUP South Melbourne 2002)