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10 February 2006

Scanned copy of original submission

The Chairman
Heritage Inquiry
Productivity Commission
PO Box 80
BELCONNEN ACT 2616

Dear Sir

Having been unaware of this inquiry until a recent article in the *Advertiser,* and unaware of the public hearing, in Adelaide, until even more recently, I attended the Stamford Plaza today in the hope of being permitted to make a verbal submission. I was, however, advised that, due to time pressures on the Commissioners, this would not be possible. I left, therefore, after about an hour.
As a person closely concerned with the management of the Adelaide Meeting House of the Religious Society of Friends, a building listed on the Register of the National Estate, the Heritage Register of the City of Adelaide and the South Australian Heritage Register, and for which nomination to the National Heritage List is being contemplated, I offer the following comments.
During my brief attendance, I was startled by the difference in treatment (and the complexity of questioning) being afforded to those suggesting problems with the draft report compared to those supporting the thrust of that report. The attitude of one of the Commissioners also concerned me.

As examples of this I offer the following:
During the submission by the representatives of the National Trust two questions were asked which concerned me.

- The first asked the National Trust to defend its current legislative and regulatory arrangements vis-a-vis arrangements that might follow the Commission's final report. The implication was that it was the National Trust's role to defend its position, not the Commission's to justify the alternatives. This juxtaposition of roles is a well known bureaucratic technique to place the questioner in a "heads I win, tails you lose" situation, where even a minor change in the details of the proposed legislation can make the response to the question irrelevant (even foolish) and thus cast doubt on the remainder of the submission under discussion. I would submit that, in order to prevent any misapprehensions as to the procedural and ethical fairness of the inquiry, the Commission should address itself to the reverse question: how the legislation to follow this inquiry would improve the situation?

- The second concerned the need for the National Trust (and similar bodies) to have their own enabling legislation. The implication was that the National Trust was merely another NGO and should be treated accordingly. This suggestion ignores the key difference between 'normal' NGOs and NGOs involved in heritage: that of time-scale.

The typical NGO or registered charity thinks in terms of one to five years. Budgets and funding appeals are concerned with the current budget year and possibly the next, while planning, typically, is based on a three to five year cycle. Appeals by these bodies are direct, and support leads to immediate returns to private and corporate donors in terms of tax-relief, publicity and 'warm-feelings'. The risk to the community should one of these NGOs fail is minimal as, in most cases, other organisations can arise quickly to undertake similar work.

NGOs involved with heritage, however, must plan on a generational, or longer, time-scale. Building acquisition must be planned years in advance while the maintenance cycle for most 'old' buildings involves 10-30 year rolling plans.' This involves the creation of sinking funds, long-term planning of acquisition and financing, and the accumulation of funds over the long-term (it can be very difficult to resist spending funds now on 'worthy' projects or acquisitions to the detriment of long-term needs). Approaches to private and corporate donors must emphasise the long-term nature of the activities, the transmission of the past to the future and justify the lack of immediate, visible outcomes. It is important, therefore, to be able to reassure donors that the organisation they are being asked to support will 'last the distance' and the existence of specific enabling legislation is one aspect of providing this assurance.

This risk to the community of the failure of an heritage purpose NGO is also considerable. The capital and monetary requirements to transmit the real property from a failing NGO to an alternative are such that, in reality, only the public sector could envisage an immediate rescue. A delayed rescue would see a 'fire-sale' of assets and, probably, a break-up of the property portfolio, to overall community detriment. The risk of such an event is minimised by the financial and probity checks and balances included in the legislation governing the National Trust (and similar organisations) but omitted from the laws governing other NGOs.

In contrast, the response to the presenters who followed the National Trust was much less inquisitorial and their submissions could be perceived as 'striking a chord' with the Commissioners.

Both presenters attempted to show that their problems were related to the fact that their buildings were heritage listed, one claiming potential monetary loss, the other claiming commercial disadvantage created by bureaucratic 'inflexibility'. These claims appear to have been accepted at face value by the Commissioners.

- Old buildings, heritage or otherwise, require regular maintenance. This is particularly so for buildings with poor foundations, on saline soils, without a damp course and in an area known for termite infestations. If maintenance is deferred or skipped (often for very good reasons) the risk of long term damage, and greater costs in the future, is exacerbated.' After a generation of neglect the cost of repairing the accumulated damage and omitted maintenance can approach, or even exceed, the value of the building were it in good condition, leaving, in the case of an ordinary building, no option but demolition and reconstruction. For a heritage building, however, the option of 'starting again' is not available, and the deferred maintenance must be undertaken by the current (or subsequent) owner.

Until proven otherwise it is probable that the difference between the 'with' building and 'without' building value of a neglected heritage building represents the NPV of the deferred maintenance and accumulated damage. In addition, while it is often convenient for the owners of a heritage building to blame 'heritage' for this problem, it is inappropriate for the owner of a distressed heritage building to seek recompense from the public purse for the consequences of their failure to maintain or repair their building.

1 Adelaide Meeting of the Religious Society of Friends is currently beginning planning the maintenance (and funds) needs for the Meeting House in the period 2010-2025.

- While it can be difficult to bring old buildings 'up to code' for matters such as fire-safety, or to include climate amelioration or control, improvements such as these are both possible and affordable. From my personal knowledge I am aware of at least three firms of heritage architects in Adelaide with the skills to design heritage sensitive improvements which will satisfy the current legislation and regulations. I am also aware of sources of funding and grants which will meet the additional costs of undertaking such improvements in a heritage sensitive way.[2] In addition, the legislation and regulations are not so restrictive as to prevent appropriate additions to heritage buildings which improve their commercial utility without disturbing their essential values. Again, any of the firms of heritage architects could design and supervise the construction of such additions.

  From the presenter's description of his tortured relations with the local authorities it would appear that his attempts to improve the commercial utility of his property have followed a different path; and that his use of the term `compromise' was based on his failure to gain approval for proposals that did not include the benefits of advice from an heritage architect. While his frustrations may be understandable, I would submit that they arise from a misunderstanding as to the role of local government heritage officers, and councillors, in seeking compliance with the relevant legislation, regulations and by-laws, as well as a failure to seek appropriate advice.

I would submit that, had the Commissioners tested these latter claims as rigorously as they tested the submission by the National Trust, a different picture might have emerged.

For the record, I am not a member of the National Trust and do not know the current office bearers. I addition, I am not in sympathy with some of the practices of the Trust, including that of locking buildings in a 'time-warp' for display and educational purposes, rather than facilitating their continued, appropriate community, social and commercial uses.

Had I been allowed to make a verbal submission to the Commissioners I would have suggested the following.

- The Commission criticises the current legislation, regulations and by-laws as proscriptive and leading to ineffective, inefficient and inequitable outcomes that erode property rights. My experience, both as a public servant and as some one closely involved in the administration of a heritage property, does not support this. My experience is that sensitive administration of the present heritage scheme in South Australia and in the City of Adelaide can lead to eminently sensible and equitable outcomes. Only fine tuning appears to be needed.
- The proposal by the Commission for negotiated conservation agreements will create problems for both property owners and State and Local Government administrators.
  - For the property owners there will be uncertainty and unnecessary costs in determining and documenting the long term (generational) needs of the property. In addition, few property owners will have the skills to negotiate such a complex arrangement; obtaining advice (or representation) may create unwanted costs. [3]
  - For government (or local government) there will be the resource problems associated with the extra work of preparing for negotiations, checking claims in the proposed agreements (undoubtedly ambit claims will occur), and ensuring equitable outcomes between various property owners. The resultant contracts will, of course, require legal input on an agreement by agreement basis.

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2 For example, it is only a few years since air conditioning was installed in Adelaide Meeting House in a way and manner that:
(i) fully satisfied the requirements of the Adelaide City Council and South Australian Heritage Branch, (ii) had no effect on the heritage values of the property, and
(iii) was partially funded by external sources.

3 Adelaide Meeting of the Religious Society of Friends recently received a quotation of $15,000 for the preparation of a dilapidation report and heritage conservation plan for the period 2010-2025. We will be commissioning the report as soon as funds permit.

• There is a likelihood that the proposals are incompatible with existing administrative law (both statute and case) and that implementation, particularly for contracts at State Government level, would be extremely complex given existing Treasurer's Instructions under the *Public Finance and Audit Act* and the probity, prudence and risk-minimisation requirements of the Auditor-General.

Further, there is the risk that:

- Properties will deteriorate during the delays and uncertainties arising from the new listing process.
- Negotiations will become adversarial and/or too hard, either leading to further discontent and/or litigation or leading to failure to list important properties.
- Outcome inequities between owners of similar properties may lead to friction within a community (at least the present system, if unfair, is equally unfair to all property owners and this unfairness can be addressed by community action).
- Uncooperative property owners may seek to hold governments to ransom (and vice versa?); the scheme proposed on page 200 of the report may well be impracticable because governments cannot walk away if the building is particularly worthy and application of compulsory acquisition is administratively complex, politically risky[4] and frequently results in litigation and excessive delays.
- Owners, or governments, may demand renegotiation if an existing contract proves onerous, with the building being at risk during the subsequent manoeuvrings.
- Unforeseen maintenance requirements or development opportunities may be delayed, or prevented, while agreements which fail to mention them are renegotiated.
- Until the system beds down, governments (State and Local) may find it easier to place the whole system in the hands of their lawyers, forcing a similar response from owners of properties for which listing is sought. This will make the system more adversarial and/or unworkable and significantly increase costs and delays, particularly until a body of case law is developed.

Although Chapter 9 of the draft report deals with general principles underlying the proposed system it needs significant additional work to discuss the details of the proposed system: discussion informed by input from coal-face administrators and property owners.

- Despite separate legislation, government and local government involvement in heritage is, at heart, an exercise in planning. Therefore, there could be flow-ons from the Commission's proposals for revamping heritage management to the planning laws in general.
  - The present system imposes additional requirements over and above the general planning laws and, despite inconsistencies, private owners of heritage properties must comply with both sets of rules.
  - A requirement that authorities and owners negotiate over heritage interests is not necessarily inconsistent with the general planning rules; these general rules will still need to be complied with as part of development proposals. However, if there are conflicts, appropriate repairs or redevelopment of a heritage building or precinct could be delayed or prevented while the differences are resolved. Sections 5 and 9 of the Commission's report lack necessary detail on how unforeseen needs or opportunities will be dealt with, where planning (development) approval is required and such needs or opportunities are not included in, or are excluded by, an existing heritage agreement.
  - Currently the planning process in South Australia operates in a deterministic manner, based on approved zoning, standards and development plans, and is administered by local government, subject to central checks and balances (including rights of the Minister in special circumstances) and oversight by the courts. The system is, for almost all applications, democratic, equitable and uniform.

4 Sir Humphrey Appleby would regard compulsory acquisition of a single building for heritage reasons as particularly "courageous".

The concept that general planning decisions might become subject to negotiation would, on the surface, appear ludicrous. However, given current examples of developers seeking special exemptions from planning laws (particularly height restrictions and parking requirements) for "commercial" reasons, there can be no doubt that once one part of the planning structure becomes subject to negotiations, intense (and potentially irresistible) pressure will develop to allow "negotiations" in other phases of the planning process.
The ability of developers to delay or withhold construction seeking better "arrangements" is well known .[5]

It would appear probable that, should "negotiations" become part of the general planning regime, inequities and anomalies would become commonplace as developers place or withhold capital according to the outcome of these "negotiations". Communities could then lose control over their built environment and could respond, democratically, by reverting to overly prescriptive rules and regulations, with obvious economic consequences.

It would appear desirable that, if the Commission is to continue with the proposal (amended where necessary) for heritage listing of private property be subject to a negotiation regime, it should also propose effective mechanisms to quarantine the negotiation regime to heritage matters only.

Summary
The Productivity Commission has conducted a detailed and thorough analysis of the current system of heritage conservation, particularly where private ownership is involved. The Commission has, however, heard more from those owners unhappy with the current system and less from those owners for whom the system is working well (or if not well, at least satisfactorily and predictably). Consequently, the Commission has concluded that there is a general system failure, rather than identifying a functioning (if imperfect) system which occasionally throws up an anomaly.

Consequently, the Commission has sought, and proposed, solutions which are far more wide ranging than are really needed; solutions that:

- are, at best, administratively cumbersome;
- are demanding of more resources than could reasonably be made available,
- are likely to become bogged down in legalisms, and
- bring with them the potential for unwanted changes elsewhere in the system.

If the Commission is unprepared to rethink its proposals for "improving" the heritage conservation system, I urge it to, at least, sort out the administrative issues raised above.

Yours sincerely

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5 There was little or no commercial development in the City of Adelaide for much of the last decade because some developers considered the planning and construction regime "too restrictive" for "commercial" returns. In addition, there still are at least three sites in greater Adelaide where intrinsically valuable buildings have been demolished and development ceased pending agreement on more "commercial" planning arrangements.