



The National Trust of Australia (NSW)

Response to the Draft Report of the
Productivity Commission Inquiry into
Conservation of Australia's Historic Heritage Places (released 9 December 2005)

February 2006

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This submission is made by The National Trust of Australia (NSW) in response to the Draft Report issued on 9 December 2005 and in support of the submission by the Australian Council of National Trusts dated February 2006 as well as the Public Hearing dated 31 January 2006 and all previous submissions.

Key Comments

- The National Trust of Australia (NSW) supports the finding that regulation alone is inadequate to protect the places and items that the community values. However the National Trust of Australia (NSW) believes that incentives should ENHANCE regulation and that listing is a vital part of the 'certainty' that is required to plan and work with those places and items.
- That while heritage should be a fundamental part of all Government policy that it is also an area where specialist input is of value in much the same way that advice re endangered species or ecology would be sought.
- That the draft report although noting that *'conservation agreements would involve each jurisdiction determining a budget for heritage conservation, and using those resources to fund such agreements'* (page 196) it is not explicit where such budgets would be found. This is particularly critical at local government level where it is acknowledged the bulk of the identified heritage is to be found and where the most fierce battles are fought. The proposed Key recommendation 8.1 is predicated on the availability of funds to support conservation agreements.
- The draft report acknowledges that the proposed changes *'would involve major changes to listing arrangements and have substantial resourcing implications for some councils'* (page 194) then goes on to say that the *'reviews of existing listed properties and delisting could [also] have major resource implications.'* (page 195). These resource implications noted are simply to undo existing arrangements and are in addition to the implications of the system if it were to be put in place.
- The economic and financial return to the community of such agreements, if agreements are not renegotiated at the end of their term, is not discussed. It is merely noted that *'failure to reach a new agreement would result in the removal of the property from the relevant heritage register and its reversion to a status with no heritage-related use restrictions, and the cessation of all financial support to the owner.'* (page 201).
- The Draft Recommendation 7.3 *'Those State governments that have specific legislation governing the operations of the National Trusts should repeal such legislation'* is made without substantiation and is beyond the scope of the Terms of Reference for the Inquiry.
- The National Trust of Australia (NSW) endorses Finding 5.2 *'the absence of [statements of significance] seriously impairs subsequent decision-making processes about listed properties'* with the understanding that the Trust believes that items already identified should not be removed as a result of this lack of a Statement of Significance.

Introduction

The Productivity Commission into the Conservation of Historic Heritage Places has brought into the public arena a wealth of information about the way heritage is considered and handled across Australia. A common thread, despite the main stance of each submission, is that there is little 'incentive' or 'reward' for being recognised by Government agencies as being important to the community. The main finding/ recommendation of the Draft

Report could be seen as an **ideal** situation. Although in those circumstances listing itself would merely be a record. It would indeed be positive if regulation was not required for heritage to be valued and protected but it is unlikely that that situation envisaged by the report will be achieved through voluntary listing and protection.

This is particularly true with the recognition of value from the recent past. It is a constant through history that the works of the previous generation are not valued until some time has past. The Edwardian decried the Victorian – the Victorian the Georgian and so it goes on. There are many examples of this in our own history of Sydney and despite early recognition by professionals it is unlikely that this trend will alter. However listening to the opinions of the professionals can prevent loss and increase education in the role of the past and allow the familiar to be looked at with new eyes.

In the 1960s the National Trust declined to include on their (non-regulatory) list the Theatre Royal arguing that because it wasn't very old (1890s) and had recent alterations it wasn't a worthy candidate. There are now no pre 1900 theatres left in Sydney CBD. Whether listing would have saved the theatre is a moot point however the decision meant not arguing for its retention at all.

The National Trust in NSW began in response to the lack of recognition and protection afforded to buildings seen as sacrificial to progress. The Draft Report focuses almost exclusively on privately owned 'heritage places' and pays scant attention to publicly owned and managed places or to those owned by not for profits or community groups. This is no doubt in response to the emotional and personal nature of many of the disputes that have arisen over listing, particularly at local level.

Key Recommendation 8.1

This recommendation which is seen as the conclusion to the findings is not a logical extension of the submissions nor to many of the points accepted by the Commission. It is only one possible method of creating 'incentives'.

The National Trust of Australia (NSW) believes that **Voluntary Conservation Agreements** are a positive way of achieving good conservation outcomes if used as a conduit for appropriate funding for works that will have a positive benefit to the place. There has been a lot of money spent across the world in the name of conservation which has caused harm to valuable fabric.

The National Trust of Australia (NSW) agrees with Draft Finding 8.1 that: '*Conservation of historic heritage on privately owned heritage property could be more effectively achieved through negotiated conservation agreements between government and owners*'. However it does not agree with the Draft Recommendation which follows it: '*Privately owned properties should be included on a national, State, Territory or local government statutory heritage list only after a negotiated conservation agreement has been entered into and should remain listed only while an agreement is in force*'. The National Trust of Australia (NSW) in turn recommends that the Recommendation should be that:

Funding for privately owned listed properties included on a national, State, Territory or local regulatory heritage list would only be made after a negotiated conservation agreement had been entered into and should only remain funded while an agreement is in force.

Discussion of Funding

page 177 notes that '*public good heritage conservation should be purchased from owners of heritage properties. This would involve public funding*'. This is certainly the case however there is no discussion about the source of such funding and the obvious burden on local government which is responsible for the bulk of the listed places. Local Government is also the area where most angst and confusion occurs possibly because of familiarity and lack of recognition by the wider community. Provision of assistance at this level is vital.

Chapter 9 discusses resource implications in a generic sense but offers no possible solutions. It is also assumed throughout that owners willing to conserve without funding would continue to do so. Whereas calls upon any

funding arrangements would be made by both those willing and unwilling to do it on their own. Added to this is the possibility that an owner may take advantage of funding for the limited period of an agreement and then capitalize on redevelopment opportunities at the end of that period.

'Uncontrolled Growth' of Lists

page 164 notes the adoption of National Trusts lists by Governments: *'this history has influenced the composition (representativeness) of lists and encouraged an uncontrolled growth over time'*. with the clear presumption that growth should be controlled and does not represent the varied values of 'heritage' by the community. Criticism follows that the assessment of value is 'subjective' (when by definition there must elements of subjectivity) and *'there is some scope for confusing community nostalgia or amenity for heritage value'*.

No definitions have been presented for 'nostalgia' and 'amenity' however and no attention to the real estate maxim 'location, location, location' on market values and possible development opportunities.

The criticism suggests that there is no rigour in the current listing processes whereas considerable time and expertise is expended on listing. The listing of 'locally' significant items will by definition be numerous. The preservation of context is fundamental to our understanding of place. There will, of course, be differing opinions about value and listings between professionals and other members of the public and it is this debate which ensures that listing is truly a reflection of community esteem.

On page 173 the Commission asserts that *'If left solely to private action, too little conservation is likely to occur, particularly of certain types of heritage places. However, if the costs of conservation are not considered when listing and protection occurs, there would be a tendency to conserve too much and/or an inappropriate mix of historic heritage places.'* Evidence of the too little can be seen in our own history of conservation but where is the evidence for 'too much'? Many places are proud of extensive conservation measures such as London, Edinburgh, Paris, Rome, San Francisco, New York and many others and some countries, like Singapore, are trying to prevent any future loss of heritage which they now perceive as detrimental to their future and world standing.

The Process of Listing

The Draft Report talks in disparaging terms of the unbridled enthusiasm of the community to list with the possibility that everything will end up on lists and 'saved' without thought to the costs and implications.

Neither national or international experience supports this view. Listing and regulation has been in place in many European countries with perhaps the oldest system comparable to our own being in Sweden (1666). This does not mean, in any place where listing is part of regulation, that that place has stagnated or that development has failed to occur.

Legal Protection of Sites – Historical International Background
<ul style="list-style-type: none">• c. 500BC a Mesopotamian ruler threatened to hang anyone who spoiled the prospect or appearance of the Royal Road to Nineveh;• Ancient Greeks tightly controlled development of their cities and care of monuments;• 1st Century AD Roman Codex forbade the demolition or removal of specific parts of buildings (including fixtures and fittings) which were essential to their quality;• a Royal a Proclamation of 1666 which demanded the protection of all historic monuments in Sweden. The Grand Duke of Hesse issued a Decree concerning surviving monuments in 1818;• the newly independent Greece followed in 1834;• France prepared a framework of controls and grants for great monuments in 1841;• Spain made its first list of 'national monuments' in 1860;• Italy in 1872;• Hungary and Egypt in 1881;

- Basic protection in the UK in 1882 (National Trust 1895);
- Australian Heritage Commission Act 1975;
- NSW State Heritage Act 1977 and statutory listing for about 10 years.

The National Trust started listing places in NSW from the 1940s. Firstly to aid the formation of the County of Cumberland Planning Scheme and later for its own register. It is true that the National Trusts lists formed the basis for many early regulatory lists but it is untrue that there is no rigour or thought in these listings. As time has progressed more and more information and analysis have been undertaken in determining community value and all National Trust listings include a Statement of Significance (sometimes called simply 'reasons for listing').

The process of including items on either the National Trust Register, local lists or the State Heritage Register is very thorough and involves many checks and balances as well as a considerable amount of expertise.

The National Trust of Australia (NSW) agrees that all listings should include a Statement of Significance or reasons to list and although it is aware that some early local studies did not necessarily include that information on individual data sheets there is always some analysis in the background information to the studies which would assist owners. However it has been common practice in recent times to include that information on the listing sheet. **The National Trust of Australia (NSW) therefore endorses Finding 5.2 with the understanding that the Trust believes that items already identified should not be removed as a result of this lack of a Statement of Significance.**

Listing in the United Kingdom

Listing in the UK is operated differently in each of the countries that make up the United Kingdom however each operates in a similar fashion. Determination of listing is done by the relevant authority, English Heritage, Historic Scotland, Cadw in Wales and Environment and Heritage Services in Northern Ireland. There is a right of appeal but there is no community consultation prior to listing. Listed Building Consent is usually an add on to Planning Permission and is handled either by the local authority for 'local' items (Grade 2 or 3 in England, B or C in Scotland and Northern Ireland) or by English Heritage, Historic Scotland etc for Grade 1 or Grade A (equivalent to our State or National).

There is a type of 'conservation agreement' in place which forms the basis for grant aiding of repairs and conservation works. To get access to funds an applicant, or owner, must employ a suitable professional for advice and suitable contractors to carry out work as well as have all methods and materials approved. In Scotland the 'rule of thumb' for grant aiding is 50% of cost of works (including professional fees) for private individuals, 33% for local authorities and 70% for Charitable and Building Preservation Trusts. There is generally a requirement that there will be some form of public access to places that receive grant aid which is usually in the form of being able to be seen from a public place such as a street or that there will be some access to the grounds at least once a year.

To some extent we have modelled our listing systems on this basis but without the grant schemes to back it up. The most notable difference (apart from the lack of financial incentive with our listings) is that the local and state listings are handled by different agencies. Although the National Trust of Australia supports the three tier system of administration it sees the compilation of lists at different 'levels' by different responsible bodies as problematic. There is no equivalent of a National List covering the different countries which make up the United Kingdom.

Despite the accumulation of more and more legislation across the world the underlying aims, ethics and practical implications remained (and to some extent remain) unresolved hence the number of Charters, Manifestos etc which have sought to grapple with these issues; many of which have led to this Productivity Commission.

An enormously wide range of opposing actions with contradictory motives have been taken over the years all in the name of protecting monuments and sites. The determination of the 'good' and the 'bad' lies in the question of value. What is seen as the predominant quality of benefit to society. One of the major differences with the Australian situation is the relative 'newness' of the systems in place and perhaps with the historical colonial attitude that 'heritage' is 'elsewhere'. Another difference is in the community consultation process which has developed because of the professionals desire to reflect the views of the community. As a consequence there appears to be an inference drawn that since people are asking 'our' opinion and trying to get 'us' to agree there must be a problem with it. This is unfortunate and has promulgated the myth that conservation is expensive whereas in most instances proper repair and maintenance of a place should not be more costly than repairing or maintaining other places. It is true that certain materials may be required which can add expense and demand specific expertise. It is for this reason that incentives should be considered to aid listing in the protection of places considered to add value to the community; the community of which the owner(s) of any particular place in question are a part.

Value Concepts

The concepts of 'value' and the assessment of value are fundamental to the debate and development of conservation philosophy and the determination of legislation and guidelines world wide.

Historicity and Value

In his seminal work on *The History of Architectural Conservation*¹ Jokilehto writes '*The new concept of historicity led to consideration of works of art and historic buildings as unique, and worthy of conservation as an expression of a particular culture and a reflection of national identity. The new concepts of history and aesthetics became a fundamental part of Western culture. The rediscovery of folklore strengthened the feeling of national identity, and gave birth to the revival of national traditions, including rebirth of suppressed languages. In the nineteenth century, there was a tendency even to invent traditions, as was seen in Britain, India and Africa.*' [p.17]

Value, either to the individual or collectively is the key issue in conservation. In fact with the definitions that emerged especially through development in the field of economics the notion of value became one of the basic issues in the theory of Karl Marx and others.

The conservation movement was based on the recognition of cultural diversity, and the relativity of values, forming the basis for a definition of the concept of 'historic monument' as part of national heritage. Later it developed parallel to stylistic restoration, emphasizing the irreversibility of time, historicity and uniqueness of buildings and objects from the past. **The simple fact that once something is gone it cannot be replaced is a fundamental concept of conservation and the basis of our legislation and the requirement for more stringent approvals processes when heritage is considered.**

Repeal of National Trust Acts

i.e., that Governments should repeal the National Trust Acts where they exist. This recommendation (Draft Recommendation 7.3) has no foundation from any evidence presented and is not related to a Draft Finding.

On 10 March 1960 the Sydney Morning Herald while discussing the proposed National Trust Act that: '*The Bill will make the National Trust a statutory body, with powers to co-ordinate a great deal of currently diffused effort in the field of preservation and to make by-laws for the administration of properties entrusted to it. Gifts and property transfers to the Trust will be free of stamp duty. But the most important result will be that it will at last give the Trust the status required to enable it to expand its resources to a size commensurate with its tasks.*'

There was initial concern that Government involvement could potentially compromise the Trust's independence but this was proved groundless. The Trust has never shirked from criticism where it was felt it was warranted.

¹ Jokilehto, Jukka, *The History of Architectural Conservation*, Butterworth Heinemann, 1999

Examples include the long term campaigns against sand mining at Kurnell and resumption of suburban areas for roads, the protection of Sydney Harbour Foreshore land and the future of the defence sites, the Conservatorium, the proposed redevelopment of North Head Quarantine Station.

When the Act was amended in 1990 it allowed the Trust to protect the conservation of properties it no longer owned, by empowering the Trust to place a Public Positive Covenant over these properties in sale contracts.

Of the 3 paragraphs presented to discuss the National Trusts the third is an aside which has no bearing on the recommendation. The first paragraph claims that the statutory status of some National Trusts 'may' diminish their effectiveness as independent advocates, but no evidence is advanced to convert this 'may' into 'does'. Indeed there is plenty of evidence that demonstrates no reluctance on the part of the National Trusts to criticize state governments.

It is also worth pointing out that the UK National Trusts similarly have statutory status. Indeed their legislation is much more powerful, at least in relation to the greater protection it provides to National Trust property. No great argument that the existence of the statutes has compromised the independence of the UK Trusts has been evident.

Paragraph 2 of the section '*Relationship between governments and community organisations*' refers to a need to develop '*appropriate transparency auditing frameworks*' (page 156). Is there an accusation here of impropriety by the National Trusts under existing accounting practices? If so these need to be discussed.

Because of its legislated status the National Trust in NSW is able to participate in the State Government's insurance arrangements. It does not get a special deal – merely that available to all Government departments with the economies of scale that result. It is likely that if the National Trust were required to make insurance arrangements independently, that premiums could rise substantially.

Legislation also increases transparency of the organisations, as it brings them within the scope of Freedom of Information legislation. Without the legislation and as fully private bodies there would be no avenue for the service of FOI notices.

An important part of the work of the National Trusts is listing across natural, cultural (including landscape) and historic heritage. The Commission obviously feels that these listings are a source of confusion, but in the experience of the Trust, although there are examples of confusion, most people are aware of the difference between the National Trust and state and local government. Trust listings are important because these are made independently of government and so are not influenced by the political pressure which may determine government listings and encompass greater interactions between natural, cultural and built heritage. Importantly Trust listings provide the underpinning and justification for much of the advocacy carried out by the Trusts. Credibility of argument is enhanced if it can be demonstrated that the items under discussion have been listed previously and the Trusts have a history of recognition of the particular site in question. **However it is never argued by the Trust or others that the list is 'Statutory'.**

'Public Good' and 'Positive Externalities'

This brings us to the vexing question of 'public good' and 'positive externalities' and public good vrs preventing public harm. It is the National Trust of Australia (NSW)'s contention that heritage is not alone in being a constraint primarily for public rather than private good. In NSW many zoning restrictions fall into this category as do questions of amenity, design and protection of endangered species, tree protection and others including:

- Scenic Protection Zones
- SEPP 14 Coastal Wetlands
- SEPP 19 Bushland in Urban Areas
- SEPP 26 Littoral Rainforests
- SEPP 44 Koala Habitat Protection
- SEPP 64 Advertising and Signage

- SEPP 65 Design Quality for Residential Flat Development
- SEPP 71 Coastal Protection
- Tree Preservation Orders under the Environmental Planning and Assessment Act prohibiting the lopping and removal of certain trees without prior Council permission.
- Easements - encumbrances on title. A right enjoyed by one owner of land over the land of another. It can also be granted in favour of a government authority. Mains, drains and water pipes are usually covered by an easement.
- Encumbrances - Any type of disability or burden that affects land (crown reservations, easements, mortgages, covenants or restrictions - generally recorded on the title).
- Restrictive covenant - A covenant which in some way restricts the use of the land and binds present and future owners.
- Right of way - Right of access across a property.
- Zoning - Statutory restriction on the used of land in a planning instrument, (uses permitted and prohibited), one of the key elements of a Section 149 certificate.
- SEPP Major Projects including Sydney Harbour Foreshores

The argument that heritage is a 'positive externality' and that all benefit is to those beyond the property boundaries also ignores the basic precept of real estate; 'location, location, location'. It can be argued that many issues result in increased or decreased value most of which are a result of actions taken by others.

It should also be noted that the provision for minimum repair standards under Heritage Listing is a provision for preventing public harm. 'Public harm' in terms of heritage retention could also be defined as the harm done by loss of identity and sense of place and its contribution to mental health. It is accepted by many psychologists that sense of place is more fundamental than any other aspect of human psychology and that this includes the notion of 'being orientated'. To lack a sense of place is to be 'disoriented'. This thinking led to the inclusion of the Right to Memory as a basic human right by the Council of Europe '*after political rights, social rights and the right to information.*'

"Sense of place" has several meanings:

1. A set of personal, family, and community narratives that include features of place. Taken together, these narratives constitute an attachment to place. It is this meaning of "sense of place" that Donald Worster seems to have in mind in *Dust Bowl*; it is also Stegner's. This meaning may embed the other meanings of the phrase.

2. The attribution of non-material characteristics to a place. The "soul" of a place; its *genius loci*.

3. Tacit knowledge of a place. This would include the ability to describe a plant or an outcropping of rock without being able to put a name to either. It would entail the tendency to have embodied skills for route-finding, but neither the linguistic nor the visual memory needed to draw a map.

A sense of place, in this meaning, would include the notion of "being oriented." To lack a sense of place is to be "disoriented." In modern industrial societies, such a sense of place is relative to mode of transport. One may have a sense of place when walking, for instance, but become utterly disoriented when in an automobile.

4. A synthetic but unsystematized body of knowledge about a place. In this meaning, systematic knowledge of place is embedded in an unarticulated system of a higher order: *knowledge* about parts but a *sense* of the whole.

[Reference – Paul Morgan – Social Worker & PhD student researching Sense of Place and *Places of Attachment*, University of Sydney and Malpace, J.E., *Place and Experience*, University of Tasmania]

Property Rights

page 163 notes that '*Where the regulation 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 penalized) or to destroy the heritage value of the property before regulation is applied. . . . Where this is the case, policy options that give property owners an incentive to protect heritage values may deliver better outcomes than regulation that merely prohibits certain actions, such as development or neglect.*'

This is an interesting paragraph because it would appear that if the private value to a property owner was truly diminished by the regulation then that owner must already be determined to undermine its heritage value otherwise there would be no consequence and that owner would be unlikely to enter into a voluntary listing.

Mr Boyd from St Ives on Sydney's North Shore is quoted a number of times declaring that potential listing has reduced the value of his property whereas its location on a main road, Mr Boyd's constant public declarations that it is ordinary, already altered and that listing would ruin him as well as a fall in the Sydney property market must be considered in any discussion of reduced value. It is highly questionable that listing would have any material effect on Mr Boyd except to accentuate his fear of control. However his distress is real and fear of the controls is a common occurrence.

The matter of effect on monetary value of listing has been the subject of many a study with overwhelming evidence to date that there is generally either no effect or a positive one however this is not acknowledged in the draft report. These reports and studies include: Deodhar, Vinita, 'Does the housing market value heritage? Some empirical evidence' Macquarie University Research Paper 2004 and Collins, Michael, 2000

Footnote 6 on page 133 of the draft report asserts that "*the Commission 'could find no evidence of sellers advertising their properties as 'heritage listed'*" The National Trust of Australia (NSW) has operated an 'Historic Houses For Sale or Lease' web site for 6 years with many Real Estate Agents and private owners choosing to advertise on it at a cost of \$275 per property. Success rates are high. Please find attached examples of advertisements on the National Trust Historic Houses For Sale and Lease website (which can be found at www.nationaltrust.com.au) and testimonials from Real Estate agents who choose to advertise in this way.

Property Rights – defined by Lyons Cottrell and Davies [Sept 2004 *On the Efficiency of Property Rights Administration*] as including 'all types of rights, restrictions, obligations, controls etc pertaining to land and/ or property'. – property rights do not override tenants rights, for the benefit of the public in general some restrictions are imposed by statute in regard to town and country planning and the environment in general. A freeholder may not carry out any development scheme on his/her land unless consent is received from the relevant planning authorities and third party rights may exist over the property and also under extreme circumstances the government may compulsorily purchase or resume land. In Australia there are about 200 pieces of legislation and again about 200 distinct rights, obligations and restrictions which can affect private property.

Costs

The Commission acknowledges on Page 181 that the costs involved in conservation are both '*those of opportunities forgone*' and '*the ongoing operation and maintenance*'. The former is difficult to calculate and restrictions as well as potential for the development of a site can depend on many things including zoning and other land use planning regulations but also on the market at any given time. There are as many cases of failed developments as there are successful ones.

The proposal to enter into **voluntary conservation agreements** with owners for the long term care of a place is reasonable if one considers maintenance costs and wider community benefits from a place being kept in good condition. However there appears to be no justification in linking this to the basic premise of recognition of value to the community. The value of the property would need to be considered prior to listing in this fashion and in

effect would need to be included on a 'list' of places appropriate for a conservation agreement. Considerable background work would also need to be done in comparative analysis so that order of rarity and value could be determined.

It is the Commission's aim that owners would voluntarily offer places of significance to be listed if incentives were in place. Further on page 181 the Report states that '*It [conservation agreements as an incentive] also provides incentives to ensure that only places that are cost-effective to conserve are listed and protected.*' If this situation had been in place when the Cremorne Orpheum was prevented from demolition by a PCO (Permanent Conservation Order) it would no longer be in existence. The owner at the time saw no potential for a future. The order was placed and the subsequent owner restored and extended the cinema. It is now one of the most popular cinemas in Sydney. **Commercial viability requires vision as well as the wherewithal to make it happen and an outcome can not be predetermined.**

The costs of managing a heritage place are as varied as the 'heritage places' themselves. For most local items the costs are no different from the costs of repair and maintenance of any place kept in good order. For some, such as the house museums owned and operated by the National Trust, the costs are much higher particularly when they have been 'saved' from neglect or proposed development and allowed to run down. These places are often of high significance and involve materials and techniques not readily available. They also involve a care and level of interpretation inappropriate for a place that is lived in and adapted for modern convenience. The costs of conserving historic landscapes and urban conservation areas are indistinguishable from other costs although 'denial of development' profits could be argued. In that case however the realities of the development in question would need to be gauged and there may be many other impediments than simply 'heritage'. Heritage place has a broad remit and these costs need to be delineated from those referred to in draft finding 7.5 relating to 'denial of redevelopment opportunity.'

'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.' It is true that some owners would willingly bear the cost of maintaining etc without listing BUT what about the others? and if an owner is perfectly willing without listing what purpose would listing serve? The only possible purpose in such circumstances would be to get access to available funds for repair and maintenance although this is not explicit in the report. **If funds are to be made available (the source of which is not explicit in the draft report) where is the return to government and the community, or other, investment if the listing and agreement is for a limited period and is to be renegotiated or not accepted by owners when the agreement runs out.**

Over-reliance on Regulation

Draft Finding 7.5 states that 'At the State, Territory and local government levels, there is an over-reliance on prescriptive regulation to achieve heritage conservation objectives. In many cases, this has led to poor outcomes, through for example, inappropriate listing imposes unwarranted costs (such as denial of redevelopment opportunity) and possibly perverse effects (such as destruction to avoid maintenance costs).'

The National Trust of Australia (NSW) agrees that there is an over reliance on prescription and too little on incentive however questions the statement about 'unwarranted costs'. The NSW National Trust does not accept that this over-reliance should form the basis of dismantling the current listing system. Rather it advocates the enhancement of the listing systems to include incentives, policies and education.



ATTACHMENTS

To be read in conjunction with the submission from the Australian Council of National Trusts particularly in relation to Section 5 National Trust findings and recommendations

1 Discussion of Draft Findings

3.1 *'Little statistical information is available on the conservation of Australia's historic heritage – the number, quality and composition of listed places; the nature, source and types of expenditures on historic heritage conservation; or the effectiveness and cost-effectiveness of those expenditures.'*

The draft report emphasizes the paucity of data on many issues relevant to the Inquiry, and the difficulty in compiling what might not be straight forward statistics on matters such as expenditure by government agencies on heritage. When it comes to the contentious issue of cost imposition on private landholders much of the evidence is anecdotal. There is no doubt that some landholders believe that heritage listing may cost them directly or indirectly 'x' dollars and undoubtedly there are cases where costs will have been incurred. Nevertheless has the Commission been able to obtain independent verification of some of the claims made?

There are passing references to the situation in overseas jurisdictions but little detailed analysis. In particular has the model favoured by the Commission been adopted previously anywhere in the world?

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

It is not uncommon practice for dual approvals to be required for important places. In the UK Listed Building Consent is required for all places listed and is generally an adjunct to 'Planning Permission' (the equivalent of our Development Applications). The equivalent to locally listed items are generally dealt with at Local Government level and others are referred to the Secretary of State via their representatives, English Heritage, Historic Scotland etc. This practice reflects the importance of listed places to the community and government and allows specialist expertise to be brought to bear on decisions. It is unreasonable to expect that all officers at local government level will be expert in all aspects that need to be considered so extra care is taken for places considered important to the community.

4.2 *'The commitment to identify, conserve and manage publicly-owned historic heritage places varies considerably between States and Territories.'*

This is true and there are lessons to be learnt for the various jurisdictions however it is not to be wondered at. As a Federation of States there are many anomalies in many areas. There is also considerable variation of commitment and legislation across the world.

4.3 *'The level of assistance provided to non-government owners of historic heritage places varies considerably between States and Territories. The level of expenditure on government-owned heritage places is difficult to calculate since no jurisdiction requires explicit budgetary recognition of such expenditure.'*

Budgetary recognition is difficult because most conservation measures are the same as normal repair and maintenance. However collection of this information would be an advantage for setting appropriate budgets.

5.1 *'There is a high level of discretion for decision-making on heritage matters at the local government level, derived in part from limited State government guidance and this has resulted in inconsistent outcomes within many local governments.'*

This would be addressed by implementing overall listing with administration at different levels accompanied by consistent guidelines.

5.2 *'While statements of significance are recommended in State guidance material, no State requires its local governments to include a statutory statement of significance in their local heritage lists. The absence of such statements seriously impairs subsequent decision-making about listed properties.'*

The National Trust of Australia (NSW) agrees that all listings should include a Statement of Significance or reasons to list and although it is aware that some early local studies did not necessarily include that information on individual data sheets there is always some analysis in the background information to the studies which would assist owners. However it has been common practice in recent times to include that information on the listing sheet. The National Trust of Australia (NSW) therefore endorses Finding 5.2 with the understanding that the Trust believes that items already identified should not be removed as a result of this lack of a Statement of Significance.

5.3 *'Heritage conservation areas impose less stringent restrictions on the ability to demolish and redevelop properties than do individual heritage controls.'*

This is true because area listings reflect that the total is more than the sum of the parts. Careful consideration is therefore given to the overall effect of intrusions or losses however at times the argument is circumvented by those who point out that individually a place is not very important. The National Trust believes that area listings are fundamental to the appreciation of heritage because they provide context.

5.4 *'Heritage controls can be applied to properties that have not been individually listed or contained within a heritage conservation zone. Typically, the owner is informed only upon seeking development approval.'*

An example of this was the house next door to the Woolley House in Mosman where the bushland setting of the house was considered fundamental to the context of the Woolley House. This prompted a wide discussion about curtilage which has yet to be resolved. However usually the issue is that a place 'has not yet been recognised'. This situation will lessen as the listing system matures and more places are recognised however there will always be some places that are not recognised until they are brought to public attention by proposed development.

5.5 *'Many property owners do not fully understand the effect that heritage listing has on their property. This is not simply a reflection of a lack of awareness by owners of the implications of listing, rather it flows from unclear legislative requirements and inconsistent administrative actions. More specifically, it is a direct result of the failure of all State Heritage Acts to specifically require a statement of significance for heritage listing at the local level.'*

This may be true however there is a lot of 'wilful ignorance' around this topic and a lot of misinformation promulgated. All bodies, government and non-government seek to educate the public of this issue and there is a lot of material readily available to explain the implications of listing. The NSW Heritage Office http://www.heritage.nsw.gov.au/07_subnav_04.htm and the National Trust <http://www.nsw.nationaltrust.org.au/register/default.asp> have explanations about listings.

5.6 *'There is significant scope to improve the management of heritage conservation by local governments in their systems and processes for land use and planning.'*

Agreed.

6.1 *While under some circumstances (particularly where neighbourhood amenity is to be preserved) heritage listing can have a positive impact on property values, the constraints on development potential associated with listing can have a significant negative impact on the prices of individual properties. The potential for owner detriment arising from development controls may differ significantly between properties.*

This may be true in certain circumstances although research suggests that the impact is generally either positive or neutral.

6.2 *Current methods of identifying historic heritage places for statutory listing focus on the benefits expected to accrue to the community. Typically, there is little, if any, consideration of the costs imposed either on the owner or the community more generally.*

The costs of conservation versus normal repair and maintenance are difficult to quantify and will change with availability of materials and skilled trades. Often the perceived potential for development is only a wish and the owner may or may not be in a position to capitalise on that potential which in itself is the product of wider market forces and timing.

7.1 *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, consistent with the principle of subsidiarity, aligns the scale of heritage significance with its level of government decision making.*

Agreed however the National Trust of Australia (NSW) believes that although the three tier approach is appropriate for the administration of listed places the determination of the list should be more centralized and that it is probably most appropriately a State level function.

7.2 *Negotiated agreements are desirable as they facilitate voluntary conservation and ensure the costs of conservation are considered alongside community benefits.*

Negotiated agreements for funding aid are appropriate but not as a *sine qua non* of listing. These mechanisms already exist within NSW and have rarely been seen as attractive by owners.

7.3 *The current arrangements for (i) agreed management plans and (ii) heritage protection on the sale of property provide a sound basis for the conservation of Australian Government-owned heritage properties. However, clearly identifying expenditure on conservation would improve accountability and provide more incentives for government agencies to better conserve listed heritage places.*

Accounting of 'extra' costs for conservation as distinct from general repair and maintenance would provide valuable information however they are often difficult to determine as maintaining a listed building as opposed to a non-listed building of similar age and condition are generally the same. However it could be argued that more care may be taken with the listed building.

7.4 *State, Territory and local governments do not have a systematic framework for the management of, and expenditure on, the conservation of government-owned heritage places. Management of government-owned places could be improved through the introduction of conservation management plans and transparent reporting of expenditure on conservation.*

This system is already in place in NSW through the Section 170 Register however commitment by government to the principle of responsible asset management is required and an acceptance that 'public good' is a responsibility of government and that Government should lead by example.

7.5 *At the State, Territory and local government levels, there is an over-reliance on prescriptive regulation to achieve heritage conservation objectives. In many cases, this has led to poor outcomes, through for example, inappropriate listing imposing unwarranted costs (such as denial of redevelopment opportunity) and possibly perverse effects (such as destruction to avoid maintenance costs).*

The National Trust of Australia (NSW) agrees that there is an over reliance on prescription and too little on incentive however questions the statement about 'unwarranted costs' particularly in reference to denial of redevelopment opportunity which may or may not have been a realistic expectation by the owner. The NSW National Trust does not accept that this over-reliance should form the basis of dismantling the current listing system. Rather it advocates the enhancement of the listing systems to include incentives, policies and education.

7.6 The current listing process does 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 added costs of conservation when the decision is made to list a place and impose regulatory controls. As a consequence:

- *the community has an incentive to over-list (or be non-selective) as they do not bear the costs of conservation; and*
- *property owners can suffer an erosion of property rights and loss of value. As a result, they are unlikely to actively conserve heritage values and may, in some cases, have an incentive to degrade or destroy the heritage place.*

The National Trust does not accept that the community has a tendency to over list. Nor does it accept that destruction of a heritage place is a common response to proposed listings. There are of course times when this is true however it is far from the norm.

The National Trust does not accept that property rights are eroded by listing.

7.7 The assistance available to private owners of heritage properties is poorly targeted, and in some cases, falls well short of the additional costs of obligations imposed on owners as a result of listing. In these circumstances, property owners will not have an incentive to actively conserve heritage values.

The National Trust agrees that assistance is under-funded and often poorly targeted. The Trust believes that 'reward' should be given for looking after places which the community values and feels that there are a range of incentives which should be explored from reduction in Council rates to financial aid for approved repair and maintenance programmes.

7.8 At the local government level, the management of heritage conservation under 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.*

While the National Trust acknowledges that there are significant problems at local government level it feels that this is a reflection of under funding, misinformation and an unrealistic expectation that local government is sufficiently removed from vested interests to make judgments for the long term good rather than short term gain.

2 Discussion of Draft Recommendations

KEY 8.1 Privately owned properties should be included on a national, State, Territory or local government statutory heritage list only after a negotiated conservation agreement has been entered into and should remain listed only while an agreement is in force.

This recommendation which is seen as the conclusion to the findings is not a logical extension of the submissions nor to many of the points accepted by the Commission. The National Trust of Australia (NSW) believes that Voluntary Conservation Agreements are a positive way of achieving good conservation outcomes if used as a conduit for appropriate funding for works that will have a positive benefit to the place. There has been a lot of money spent across the world in the name of conservation which has caused harm to valuable fabric.

The National Trust of Australia (NSW) in turn recommends that the Recommendation should be that:

Funding for privately owned listed properties included on a national, State, Territory or local regulatory heritage list would only be made after a negotiated conservation agreement had been entered into and should only remain funded while an agreement is in force.

3.1 All levels of government should put in place measures for collecting, maintaining and disseminating relevant data series on the conservation of Australia's heritage places.

The draft report emphasizes the paucity of data on many issues relevant to the Inquiry, and the difficulty in compiling what might not be straight forward statistics on matters such as expenditure by government agencies on heritage. When it comes to the contentious issue of cost imposition on private landholders much of the evidence is anecdotal. I do not doubt that landholders believe that heritage listing may cost them directly or indirectly 'x' dollars and undoubtedly there are cases where costs will have been incurred. Nevertheless has the Commission been able to obtain independent verification of some of the claims made?

There are passing references to the situation in overseas jurisdictions but little detailed analysis. In particular has the model favoured by the Commission been adopted previously anywhere in the world?

7.1 The Australian Government should phase out the Register of the National Estate for historic heritage purposes, beginning with the closure of the Register to any new nominations.

Apart from a desire to reduce confusion over lists this recommendation appears to be without support from an appropriate finding. The RNE is a historical record which has great support from the community.

7.2 State and Territory governments should remove any reference to the Register of the National Estate from their planning and heritage legislation and regulations.

As above.

7.3 Those State governments that have specific legislation governing the operations of the National Trust should repeal such legislation.

This Recommendation has no foundation from any evidence presented and is not related to a Draft Finding. It is also beyond the Terms of Reference for the Inquiry and is discussed in detail on page 5 of this submission and on pages 53-56 of the ACNT submission dated February 2006.

7.4 The Australian Government should implement reporting systems that require government agencies with responsibility for historic heritage places to document and publicly report on the heritage related costs associated with their conservation.

This system is already in place at a State level in NSW through the Section 170 Register however commitment by government to the principle of responsible asset management is required and an acceptance that 'public good' is a responsibility of government and that Government should lead by example.

7.5 *State, Territory and Local governments should:*

- *produce adequate conservation management plans for all government owned statutory listed properties; and*
- *implement reporting systems that require government agencies and local governments with responsibility for historic heritage places to document and publicly report on the heritage-related costs associated with their conservation.*

Agreed. However allocation of funding must be made to physical conservation works not simply planning and reporting.

9.1 *The Australian Government should implement processes whereby any additions of non-government owned properties to the National List occur only after a conservation agreement with the owner has been entered into, and that the property remain on the list only while agreement is in force. Consistent with its stated preference of relying on agreements for the management of world and nationally significant historic heritage places, the Australian Government may wish to make this a statutory requirement under the Environment Protection and Biodiversity Conservation Act.*

9.2 *State and Territory governments should modify heritage legislation to ensure that any additions of non-government owned properties to their statutory heritage conservation lists occur only after a conservation agreement has been entered into, and that the property remain on the list only while an agreement is in force.*

Listing should not be a consequence of voluntary action however funding should be a consequence of conservation agreements

9.3 *State governments should require their local governments to add non-government owned properties to a local heritage conservation list only after a conservation agreement has been entered into and remains in force.*

Listing should not be a consequence of voluntary action however funding should be a consequence of conservation agreements

9.4 *State governments should put in place systems for their local governments to request compulsory acquisition in cases where this becomes the only way to ensure cost-effective conservation of places of local significance.*

Acquisition should always be an option where all else fails.

9.5 *Private owners of already listed properties, where the listing occurred after purchase of the property, should be able to apply for a negotiated conservation agreement and for listing to continue only if an agreement is reached.*

Listing should not be a consequence of voluntary action however funding should be a consequence of conservation agreements. Existing listings should remain in force.

9.6 *Private owners of already listed properties, where the listing occurred prior to the purchase of that property, would remain covered by the existing 'package' of restrictions and concessions (if any). These arrangements would be reassessed at the time of any substantive development application when negotiations for a new conservation agreement would occur and listing would continue only if an agreement is reached.*

Listing should not be a consequence of voluntary action however funding should be a consequence of conservation agreements. Existing listings should remain in force.

9.7 State and Territory governments should modify their planning legislation and regulations to remove any requirement to take heritage considerations into account in relation to individual property other than those requirements relating to zoned heritage areas.

This requires prior knowledge and prior assessment which is unrealistic and detrimental to the future of conservation.

9.8 State and Territory governments should remove the identification and management of heritage, zones, precincts or similar areas from their heritage conservation legislation and regulations, leaving these matters to local government planning schemes.

Although it is agreed that heritage should be dealt with by many levels of planning and government, and integrated into all decisions affecting a place, the designation of heritage zones and precincts under the Heritage Acts reflects the importance of them. The simple fact that once something is gone it cannot be replaced is a fundamental concept of conservation and the basis of our legislation and the requirement for more stringent approvals processes when heritage is considered.

Area listings reflect that the total is more than the sum of the parts. Careful consideration is therefore given to the overall effect of intrusions or losses however at times the argument is circumvented by those who point out that individually a place is not very important. The National Trust believes that area listings are fundamental to the appreciation of heritage because they provide context.