**WRITTEN COMMENTS ON PRODUCTIVITY COMMISSION DRAFT REPORT – CONSERVATION OF AUSTRALIA'S HERITAGE PLACES**

I wish to comment upon the draft report of the Productivity Commission. My previous experience as a heritage consultant to private corporations and the State Government, as well as my current experience as a lawyer advising on the Heritage Act 1977 (NSW) has provided me with background knowledge of the heritage processes under review.

**Draft finding 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.*

This finding is based on an assessment of planning appeals concerning heritage items. It fails to recognize the situation where the heritage significance of a threatened item has not been previously recognized, either because no heritage study has been done in the area, or it has only recently acquired heritage significance. This could occur if an item becomes rare because other examples have been demolished, or because its connection with a famous person or event has only recently been discovered.

If there was no scope for protecting a place which has not previously been recognized as significant, this would lead to the loss of significant items merely because of a lack of resources or energy on the part of the council to research all the potential heritage items in its area. A number of heritage studies done for councils in NSW are out of date. The Heritage Council in 2002-2005 has determined less than half of the items nominated for listing on the State Heritage Register (Heritage Council Annual Report, 2004-5, p. 23).

Furthermore, this finding is in direct contradiction to **Draft finding 7.5** which states:

*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).*

It is not clear what evidence the Commission has relied upon in making this finding nor **Draft finding 7.6** that there are strong incentives to "overlist" properties. There are no statistics provided evidencing the "many" cases of "poor outcomes" nor the "unwarranted" costs.

In fact Table B13 on page 239 of the draft report seems to contradict this finding. This shows that a very small amount of development applications for heritage places were rejected by councils in 2004-5, the highest being 4.3% in South Australia, three states being between 2 and 3%, one state 1.9% and one State 0.2%. It is difficult to sustain an argument that properties are overlisted and this has a negative effect upon owners when

so few developments are knocked back. It is also hard to see what benefit would accrue from the abandonment of listing proposed (see below). There may however be a benefit to be gained by offering heritage agreements as an alternative to rejection of a development application.

**Heritage Listing**

The report's treatment of the "listing" of heritage items is confusing. It seems to consider all "listing" generically (see p.186), including National Trust listing (which has no statutory effect) with local, State and National listing (which have varying statutory effects). Not all listing place the same restrictions on owners.

Listing also serves the important function of identifying items of significance, alerting authorities to what other significant items exist so that they can assess the rarity and significance of their own items. It perhaps most importantly, necessitates the undertaking of heritage studies and other research into heritage items and areas which would otherwise not be undertaken. It also alerts potential owners to a property's significance.

These important functions of listing have not been fully recognized by the Commission. However the Commission's recommendations regarding listing have serious implications for future knowledge of our remaining heritage, because it has recommended that items should only be listed and protected if they are subject to a conservation agreement (Draft recommendation 8.1).

While it may be possible to restructure the assessment process so that listing by, for example, the Heritage Council of NSW, does not automatically mean protection, with protection following on later after a consideration of cost and other matters, the reality is that Governments would probably then only consider it an efficient use of their resources to research and assess the items that were at risk or were likely to become the subject of a conservation agreement or acquisition, and would not expend funds in research and assessment of other items for the future. This would mean the public body of knowledge of our heritage would be much poorer. A greater burden would then fall upon the National Trust, which relies mostly on volunteer activity.

This proposal has the potential to damage the entire heritage protection process, for, as the Commission itself recognizes, it is necessary to rank and compare properties in order to determine significance and the need for conservation (p. 195). How can properties be properly compared when the lists of heritage items are limited by cost considerations?

Further, if the cost of conservation was required to be considered at the time of determining whether an item should be listed, it would introduce another factor into the determination of significance which in fact has nothing to do with significance itself, and everything to do with the *consequences* of significance. There has to be a cost-neutral means of identifying what is significant. Cost should not be considered at this stage although it should be considered once significance is determined (see below).

**Deciding what is preserved**

The consequences for conservation of the Commission's approach is expressed in the statement on page 186 that: "society would seek to protect and preserve *only* those heritage places that is (sic) was prepared to pay for in addition to those that owners were willing to have protected in their own interest" (my emphasis). How is it to be determined what society is prepared to pay for? And is society the best judge?

Existing forms of heritage assessment have been criticized in the Commission's report for being too subjective, but this approach would appear to replace a logical process conducted under established criteria with an extremely subjective process. A particular heritage item may not have visual appeal but is nonetheless significant for social or archaeological reasons. Will such an item be protected under this scheme? It seems unlikely. In reality the decision will be made by a Minister or local council who is considering financial expense, public reaction and political considerations. If there is no public outcry (and even if there is) who will consider the item's conservation "cost-effective" in those circumstances? Many heritage items do not have popular appeal. Perhaps they do not suit the current architectural taste, they remind us of unpleasant episodes of our past or they can't be reused in a profitable way. (See case study).

Of concern also is **draft recommendation 9.8**:

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

Certain heritage areas are clearly of State significance eg The Rocks and Haberfield in New South Wales. The NSW Heritage Office has recently considered listing a whole town (Braidwood). The Sydney Harbour Regional Environmental Plan has recognized the importance of identifying heritage conservation areas and views. Piecemeal protection of heritage is no longer best practice. A more systematic approach is required and this will necessitate a State perspective in such cases. This is quite different from zoning under Local Environmental Plans which relates to planning issues.

**Who Should Pay?**

The Australian Council of National Trusts rightly says that historically there have always been constraints on our use of private property and it is part of the policy of planning to impose such constraints on developers in return for benefits (p.143). The Commission seeks to differentiate regulations which constrain harmful activities and those which coerce an individual to provide a benefit (p.143-4). This distinction is, I submit, largely one which lacks a difference – the destruction of a significant heritage item and its replacement with an unsympathetic development can be seen as harmful to the community just as pollution is harmful.

But nevertheless there are precedents for regulations which require a developer who is receiving the benefit of developing a property and therefore making a profit, to also provide a benefit for the community. Examples exist under the Environmental Planning and Assessment Act 1979. Section 93F provides for planning agreements to be entered into, whereby the developer seeking a variation to an environmental planning instrument, dedicates land free of cost, pay a monetary contribution, or provide any other material public benefit, or any combination of them, to be used for or applied towards a public purpose. Such agreements can run with the land (unlike the proposed heritage agreements).

State Environmental Planning Policies can provide for contributions towards community amenities such as affordable housing (section 94F) in the form of dedicated land or monetary contributions.

Conditions of development approval under s.80A have often required the developer to do something that produces a public or private benefit which relates to the factors considered by the authority when approving the development application. It is a well known part of planning policy in NSW and has benefits for the community.

**Heritage Conservation Agreements**

The report's most significant recommendation is that no heritage items be listed unless they are subject to a heritage conservation agreement.

I have been involved in drafting and negotiating one such agreement over a heritage property owned by a private institution. It was a resource-intensive process and involved complex legal input as well as technical input from heritage consultants who were specifying the nature of the works to be carried out under the agreement. Therefore there were significant costs involved on both sides even before considering the cost of conservation. The agreement was only feasible because the site in question was being developed and there were therefore funds provided by the developer who was anticipating a profit from the project. The funds went to conserving a building on the property. In my view the introduction of heritage agreements as a condition of listing would be a negative step for the following reasons.

1. Authorities and owners would be reluctant to engage in them because of the time and financial resources required.
2. The agreements as proposed would apparently only be binding on the existing owner. This would mean that where the property changed hands the process would have to be engaged in all over again, which is not an efficient use of the resources involved.
3. The agreement would require funding from some source to make the necessary conservation possible. The report has not fully examined any new sources of funding, despite submissions made on this issue.
4. It would decrease the number of heritage items identified (see above).

5. Both parties would probably wish to seek legal advice which would add to the expense involved.

While such agreements can be successful they are contingent on various factors, such as the availability of funding, the agreement of the parties on the work needed to be done to preserve the item's significance, and the existence of sufficient time to negotiate (which may not be the case if an item is proposed to be developed and is not statutorily protected). Another big factor is the land's development potential. If an owner can make $10 million from developing a property, but only $3 million from conserving it, there is no incentive apart from public spiritedness for the owner to refrain from development. While the intention may be praiseworthy, in practice the abolition of listing and the introduction of heritage agreements would probably lead to the "clear felling" of unprotected heritage items.

If such agreements are to be used it is preferable that:

1. They be an adjunct to listing rather than a replacement.
2. The conditions be registered on the land title in a form of covenant ensuring the future protection of the heritage item, in return for the incentives under the agreement.
3. There be a funding program established to support the identification of suitable places, the negotiation of the agreement and the conservation work to be done.
4. That a widespread education program be introduced alerting property owners to the benefits of voluntarily agreeing to conserve and maintain their heritage property.

It should be noted that it is often a developer (who may not be the same as the owner) who has the funds and has already acquired the right to develop the property, and may have to be involved in any agreement.

**Source of funding and incentives**

Although the Commission's recommendations largely rely on the availability of financial incentives, the report does not anywhere clearly identify or recommend potential new sources or means of funding for incentives to private owners of heritage items. This is unexpected as this subject clearly comes within term of reference No. 4 which refers to the "positive and/or negative impacts of regulatory, taxation and institutional arrangements on the conservation of historic heritage places, and other impediments and incentives that affect outcomes" as well as term of reference No. 5: " emerging … economic, environmental and social trends that offer potential new approaches".

The possibility of council rate rebates is mentioned, but its practicality is not investigated.

Nowhere is the Commonwealth Government suggested as a source of funding, nor is the possibility of rotating funding (where funds are used to restore a property, that property is then sold and the income used to assist another property), lottery funding as is used in the

United Kingdom, income tax or land tax rebates fully explored. If the benefit provided by heritage preservation is a benefit to society as a whole, surely these should be considered. There are many imaginative sources of funding being explored overseas. The extreme inadequacy of funding has been clearly identified in submissions. The Commission has not put forward any creative means of funding heritage which with its expertise, one would have hoped for.

**Case Study – Demolition of Edwardian public lavatories in Sydney**

On 2 July 2004, the Minister assisting the Minister for Planning, on the recommendation of the Heritage Council of New South Wales, listed the Taylor Square underground public conveniences at the intersection of Oxford, Forbes and Bourke Streets in Darlinghurst on the State Heritage Register. This elegant structure, dating from 1907, is now legally protected from damage and unsympathetic alteration. The public conveniences were described in the Heritage Council's Statement of Significance as "a rare and lasting record of the major reforms and achievements of the early 20th century in sanitation, public health, technology and City design…The only other known examples of purpose-designed public underground toilets in Australia from this era … are located in the inner city of Melbourne."


**Macquarie Place lavatory (1908) before alteration**

This might seem like progress – our twentieth century heritage is being recognized and protected. But there's a sad irony behind the event. The reason that the Taylor Square lavatory is the only known example of its kind in Sydney is that three other examples of the same date and condition were demolished or severely altered, shortly before, at the direction of Sydney City Council.

The story of their demolition demonstrates why conservation cannot be left to the whims of owners — even when the owner is a council.

The story begins in 1900. In that year bubonic plague broke out in Sydney and recurring outbreaks in subsequent years focused the attention of both State and local government on public health and sanitation. During the course of the plague it became clear that many houses in the inner urban areas had faulty sewerage connections, while others had none at all. Respectability also required that the undesirable sight of men urinating in public should be reduced, or at least concealed.

Women working in the city suffered more, as often their employers did not provide them with lavatories and the city was slow to recognize their needs.

The first underground public conveniences in Sydney opened on 24 May 1901. On 10 May 1907 the Taylor Square lavatory was opened. Contracts were entered into for construction of men's lavatories at Macquarie Place, at the intersection of George Street and Barton Street, in Hyde Park in Park Street near Elizabeth Street, and in Martin Place.

These public conveniences were not like the ones we know today. They were open from 5 am until midnight. Two attendants worked shifts each day at each, and eight attendants were employed in total. The underground lavatories were tiled with white glass tiles in an

"opalite" or "florite" pattern. Glass tiled domes let in natural light. The exterior was decorated with ornate Art Nouveau ironwork. The floors were concrete and covered with "arkilite" or "ironite" paving, red in colour. All the doors, frames and fittings were of polished Tasmanian blackwood or cedar. They were lit throughout with electricity.

Gradually many of the toilets were demolished, until only four were left – those in Macquarie Place, Hyde Park and Wynyard Park as well as Taylor Square. They were recognized as significant by various bodies (although not then by the State Heritage Council) and had been listed on the Register of the National Estate, the National Trust Register and the Sydney Local Environmental Plan.

However these structures became increasingly inconvenient for the City of Sydney Council. They attracted drug users and homeless people. They required maintenance to keep clean and being underground, they were not easy to monitor. Finally they were locked while the Council sought other options for their use. A wine bar or café were suggested. However all these plans came to nothing and in January 2003 the Council, then headed by Mayor Frank Sartor (now Minister for Planning), granted consent to its own development application to alter or demolish the toilets in Macquarie Place, Hyde Park and Wynyard Park within its boundaries.

**Wynyard Park lavatory (1912) now demolished.**

Mayor Sartor then departed the Council to his new position as a Government Minister. His successor Lucy Turnbull maintained the Council's hard line on the development, and despite protests by the National Trust and others, demolition work began. The Wynyard Park toilets were demolished and converted into an entrance into the Park. The Macquarie Place example was filled in, its glass removed, the original sandstone entrance blocked off and its dome filled with soil and plants. Hygiene was deemed more important than heritage and the toilets are now more thoroughly hidden from sight than when they were first put underground one hundred years ago to protect the sensibilities of Edwardian Sydney.

In this case council listing on the LEP did not protect these items and the Heritage Council did not consider whether an Interim Heritage Order could be placed on the lavatories to protect them while a determination was made whether any were of State heritage significance. According to the Heritage Office at the time: "…the public generally does not accept the use of such underground lavatories on the grounds of current standards of hygiene and access as well as perceptions of personal safety and the City Council is presented with issues of maintenance and liability… the chance of adaptation of such structures to a viable new role… is of little likelihood."

It is difficult to ascertain what role politics played in the outcome. However where there is a will to preserve heritage items, it is possible. Vienna has preserved the beautiful public underground toilets of the same era designed by the famous Jugendstil architect Adolf Loos, and they are still used today. Melbourne City Council has recently prepared a management plan to guide its approach to public lavatories. Sadly, the political will was lacking in this case. The lavatories did not have an easy public appeal, and the Council encouraged a perception that they were unsafe.

The irony is that the destruction of the three lavatories by the Sydney City Council made the remaining Taylor Square toilets even rarer, as the Heritage Council belatedly recognised. They are now the sole surviving example in Sydney and have been determined to be of State heritage significance.

It was the new City Council which nominated the Taylor Square lavatories for heritage listing and is looking for alternative sites for its use. However all four could have been part of Sydney's landscape giving the public the opportunity to appreciate these Art Nouveau shrines to sanitation. That chance has been lost forever. Three out of the four *only known examples in Australia* apart from one example in Melbourne have been demolished.

What can be learned from this case study? Firstly, that the impression that heritage listing (particularly at local level) affords protection in every case, is misleading. Many old and rare items have not yet been considered for inclusion on the State Heritage Register and are not fully protected. Secondly, that owners will not be willing to conserve items where they are deemed to be inconvenient or expensive. Government owners are not immune from self interest. Thirdly, that in the absence of systematic research and listing it is easy for items to be demolished because it is "too hard" or inconvenient to determine if they are significant. Finally, that protecting heritage should not be left to political whims, majority views or the owner's consent. If that were the case very little would be preserved.

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