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HERITAGE LISTING:
WHO SHOULD BEAR THE COSTS?

BY

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I INTRODUCTION

Heritage preservation is at the forefront of community values and government policy in Western Australia. However, despite the importance of heritage to the community, the legal and economic costs of heritage preservation are disproportionately borne by private property owners to the extent that their property rights are eroded. This cost burden on private owners is economically unreasonable and a rebalancing of the costs of heritage conservation is desirable. Specifically, the community's contribution ought to be greater because of the benefits it gains from heritage preservation.

An objective overview of the heritage system in Western Australia will be given at the outset. This will provide a framework that highlights where the costs of heritage originate. The paper will move on to identify the legal and economic costs of heritage and discuss the manner in which those costs are apportioned. It will ascertain whether the current distribution of costs constitutes an erosion of private property rights.

Having established that the costs of heritage are disproportionately borne by private property owners, the paper will move on to evaluate the key conceptual frameworks that justify the conservation of heritage and the way that the costs arising from the conservation are allocated under these frameworks. It will be shown that there are two main traditions when modeling the justification of heritage conservation. Firstly, there is the tradition established by the Victorian sage, John Ruskin, in which people are assumed to be sufficiently ill-bred, ill-educated and irrational that consumer sovereignty is deemed

inappropriate when judgments need to be made about aesthetic and cultural matters, such as the conservation of heritage. Ruskin therefore proposed that people should be forced into conserving heritage because they do not know what is good for them and further, that the objects worthy of heritage conservation should be determined by some sort of elite. Secondly, there is the rational tradition in which heritage conservation is justified on the grounds of the public good nature of heritage. Consumer sovereignty is preserved within this tradition, but the free-rider problem arising from the public good nature of heritage dictates that the government, after due consultation with the community, must play some role in overseeing heritage conservation. By establishing that heritage is a public good that results in market failure, the paper will argue that non-market arrangements for the preservation of heritage are required.

It will be argued in the paper that follows that the rational tradition is clearly superior to the Ruskin tradition as an appropriate justification for heritage conservation, but that the costs of meeting the conservation requirements are usually inappropriate allocated under both traditions. The current schemes in place to compensate owners suffer from inherent limitations and are, in most cases, insufficient to fully counteract the economic burden that private owners incur. The costs of heritage need to be reallocated so that the community bears a more significant portion of the costs. The paper will conclude by putting forward various practical recommendations to achieve this balance.

The scope of the paper is limited to analyzing the distribution of the costs of heritage preservation in Western Australia. Furthermore, the paper focuses exclusively on the

cost burden borne by private property owners as opposed to heritage places owned by the State. This is because primary residences comprise a significant proportion of heritage places in the Register, with nearly half of the places in the Register in private ownership,¹ and represent a salient example of the misallocation of the costs of heritage.

¹ Commonwealth, *Conservation of Historic Heritage Places: Productivity Commission Inquiry Report*, Parl Paper No 37 (2006) 182.

II OVERVIEW OF THE HERITAGE SYSTEM IN WESTERN AUSTRALIA

A *Three tiered legislative system*

Heritage significance in Australia is assessed under a three-tiered legislative system that determines the Local, State and Commonwealth significance of a property. Heritage assets can also be included on non-statutory listings such as the National Trust.² It is possible for one property to be affected by legislation at the Commonwealth, State and Local levels.³ This imposes multiple constraints on owners because a property might potentially be protected by authorities at the three levels of government.⁴ This paper will focus on the constraints imposed at a State level because the Register of Heritage Places, under the control of the Heritage Council of Western Australia, has significant legal implications for private property owners.⁵

B *Heritage at a State level in Western Australia*

The *Heritage of Western Australia Act 1990* (WA)⁶ is the central piece of legislation that governs heritage in Western Australia. The Heritage Act protects places of 'cultural heritage significance'. Section 3 defines 'cultural heritage significance' as the relative value that a place has in terms of its aesthetic, historic, scientific or social significance, for the present community and future generations. The Act was developed to reflect the

² The Allen Consulting Group 'Valuing the Priceless: The Value of Historic Heritage in Australia' (2005) Report prepared for the Heritage Chairs and Officials of Australia and New Zealand, 1.

³ 'Westroc Heritage Study: De-mystifying Heritage' (2002) Report prepared by Chris Antill Planning & Urban Design Consultant Heritage and Conservation Professionals, and Sheryl Chaffer & Associates for the Western Suburbs Regional Group of Councils, 23, 24.

⁴ Ben Boer and Graeme Wiffen, *Heritage Law in Australia* (China: Oxford University Press, 2006) 193.

⁵ Western Australia, *Review of Heritage of Western Australia Act: Discussion Paper* (1996) 4.

⁶ Referred to as 'the Heritage Act' in the text.

concerns of Government, landowners, conservation and heritage groups and the community.⁷ However, the community's aspirations seem to be dictated by Government and conservation and heritage groups who were the only groups consulted during the development of the Heritage of Western Australia Bill 1989 (WA).⁸ Therefore the assumption, on which the Heritage Act is based, seems to be drawn from the Ruskin tradition that denies consumer sovereignty and allows the State to legislate to protect what it perceives to be good for consumers.

The Heritage Act establishes the Heritage Council of Western Australia⁹ as the government advisory body on heritage matters. The main functions of the Heritage Council include:

- (a) advising the Minister with responsibility for the Heritage Act, currently the Hon Michelle Roberts, on matters relating to places that have or may have cultural heritage significance;¹⁰
- (b) compiling and maintaining a Register of Heritage Places considered to be of State significance to be protected by the provisions of the Heritage Act;¹¹ and
- (c) providing and facilitating financial or technical assistance or other conservation incentives.¹²

⁷ Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 November 1989, 4856 (Mrs Beggs, Minister for Planning), 4856.

⁸ Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 November 1989, 4856 (Mrs Beggs, Minister for Planning), 4856, 4857.

⁹ Referred to as the Heritage Council in the text.

¹⁰ *Heritage of Western Australia Act 1990* (WA) s7(1)(a).

¹¹ *Heritage of Western Australia Act 1990* (WA) s7(1)(b).

¹² *Heritage of Western Australia Act 1990* (WA) s7(1)(d).

Heritage protection in Australia is organised around heritage inventories or lists called 'registers'.¹³ The Register of Heritage Places¹⁴ is a statutory list of places that have been assessed by the Heritage Council and are considered to have cultural significance for Western Australia.¹⁵ There are 1113 State heritage registered places in Western Australia.¹⁶ Nearly half of the places on the State list are in private ownership.¹⁷ Places in the Register include buildings and other structures, historic gardens, archaeological sites, landscape features and historic cemeteries. To be included in the Register a place must have cultural heritage significance.¹⁸

Once a property is entered in the Register, the Heritage Council is required to lodge a memorial of the entry at the Department of Land Information, the Registrar of titles or the Registrar of Deeds and Transfers.¹⁹ The officers of those departments must then inform the people seeking information on the title of the land.²⁰ There is also an obligation on the Heritage Council to make the Register available for inspection.²¹ Where a property is entered in the Register, all:

- (a) applications for approval of development in a planning control area made under Part 7 of the *Planning and Development Act 2005* (WA);

¹³ Boer and Wiffen, above n 4, 193.

¹⁴ Referred to as the Register in the text.

¹⁵ *Heritage Council: An Overview* (2005) Heritage Council of Western Australia <http://www.heritage.wa.gov.au/pdfs/pubList/section2/overview_020722.pdf> at 25 March 2007.

¹⁶ Productivity Commission, above n 1, xxiii.

¹⁷ Productivity Commission, above n 1, 182.

¹⁸ *Heritage of Western Australia Act 1990* (WA) ss 3, 47.

¹⁹ *Heritage of Western Australia Act 1990* (WA) s56(1); Graham Castledine, 'Heritage Legislation' (Perth: Law Society of Western Australia, 2000) 1.

²⁰ *Heritage of Western Australia Act 1990* (WA) s56(6); Castledine, above n 19, 1.

²¹ *Heritage of Western Australia Act 1990* (WA) s57(1).

- (b) approval applications under sections 135, 136 or 162 for subdivision , development, or approvals of conveyances, transfers, leases or mortgages for the purposes of section 147, of the *Planning and Development Act 2005* (WA);
- (c) licence applications under section 374, for approval of building plans, or 374A, for demolition licences, of the *Local Government (Miscellaneous Provisions) Act 1960* (WA);
- (d) applications for a certificate of approval for a strata plan under section 25 of the *Strata Titles Act 1985* (WA) ; and
- (e) other prescribed applications,

which are before the decision making authority, must not proceed until the application has been referred to the Heritage Council for advice.²² This effectively hinders the application process for private property owners planning to develop, build or demolish a heritage listed property.

C *Restrictions placed on listed properties*

The Heritage Act imposes restrictions on the nature and extent of works that may be allowed to occur on the property. Heritage properties are regulated through procedures that require approval prior to carrying out a variety of works including demolition, additions and construction of new buildings.²³ The types of restrictions are either mandatory, that is, they require the property owner to take a particular action, or prohibitory, in that they forbid property owner from taking action of the kind stipulated.

²² *Heritage of Western Australia Act 1990* (WA) s78(1); Castledine, above n 19, 1.

²³ Antill and Chaffer, above n 3, 7.

Mandatory restrictions represent a more onerous incursion on property rights because they force the property owner into action.

1 *Restrictions imposed by the Heritage Act compared to restrictions imposed
by local planning schemes*

The *Planning and Development Act 2005* (WA) sets out development standards which can be prescribed by a local planning scheme. These standards include appearance, landscaping, measures to maximise energy efficiency and parking.²⁴ If a property is in the Register, restrictions on property use under the Heritage Act apply in addition to local planning scheme restrictions. Further, the local government must refer the proposed local planning scheme to the Heritage Council for advice and have regard to this advice.²⁵ The *Planning and Development Act* provides compensation to alleviate disadvantage caused by restriction whereas compensation is not provided by the Heritage Act.²⁶ Therefore, restrictions imposed on property use under the Heritage Act are more onerous than restrictions placed on properties under local planning schemes due to the nature and extent of the restrictions and the absence of compensation.

2 *Avenues of appeal*

Anyone can nominate a property for entry in the Register. The place is then assessed by the Heritage Council for cultural heritage significance. Places of cultural heritage significance may be entered in the Register at the direction of the Minister for Heritage

²⁴ *Planning and Development Act 2005* (WA) Sch7, c8.

²⁵ *Planning and Development Act 2005* (WA) s75.

²⁶ *Planning and Development Act 2005* (WA) Part 11.

following advice from the Heritage Council.²⁷ The owner has an opportunity to object to registration during the assessment process, however, if the Minister is satisfied the place has cultural heritage significance, it can still be entered in the Register without the owner's approval.²⁸

While there are administrative avenues of appeal whereby an applicant may appeal to the Minister against any conditions imposed by the Heritage Council,²⁹ there is no provision for judicial appeals against the Council's decision to list a property in the Register. Thus, despite the important consequences for the owner's use of the property³⁰ the decision of the Council is absolutely final. This means that the owner's property rights are seriously affected, without giving them any avenue by which to challenge the decision.

²⁷ *What is the State Register?* (2007) Heritage Council of Western Australia <<http://register.heritage.wa.gov.au/explanation.html>> at 26 August 2007.

²⁸ *What is the State Register?* (2007) Heritage Council of Western Australia <<http://register.heritage.wa.gov.au/explanation.html>> at 26 August 2007.

²⁹ *Heritage of Western Australia Act 1990* (WA) s79.

³⁰ Boer and Wiffen, above n 4, 211.

III WHAT ARE THE COSTS AND WHO BEARS THEM?

The consequences of listing a property in the Register are substantial, albeit highly variable, in terms of the nature and extent of works that may be allowed to occur on the property.³¹ Heritage necessarily involves significant direct and indirect costs to property owners and the community including:

- (a) compromises to contemporary use and enjoyment;
- (b) the opportunity costs of adhering to heritage listing include:
 - (i) loss of market value arising from the forgone development possibilities otherwise permitted for the property;
 - (ii) the added costs above normal repairs and maintenance for conservation of the heritage features; and
 - (iii) additional administrative costs of complying with the heritage regulatory systems.

Under the current regulatory process, there is no requirement to take into account any costs, whether financial or non financial, at the time that a property is assessed and added to the Register, nor is the process of listing linked to the provision of assistance.³²

³¹ Productivity Commission, above n 1, 36.

³² Productivity Commission, above n 1, 172.

A *Legal Costs: restrictions on property use*

Incorporation of a property in the Register imposes constraints over the extent and nature of works allowed to occur on the property.³³ Heritage owners require prior approval for any action that may affect the heritage significance of an item listed in the Register.³⁴

Examples of the kind of works that must be referred to the Heritage Council include:

- alterations and additions;
- construction of new buildings;³⁵
- conservation and remedial works;
- demolition;
- relocation;
- excavations;
- re-roofing;
- changes of exterior colour schemes;
- signage;
- interior works;
- subdivision/amalgamation; and
- change of use.³⁶

The nature of the restrictions on property use can be further distinguished from local planning scheme restrictions by the robust enforcement mechanisms in the Heritage Act.

³³ Lynne Armitage and Janine Irons, 'Managing Cultural Heritage: Heritage Listing and Property Value' (Paper presented at the European Real Estate Society Conference, Dublin, June 2005) 5.

³⁴ Boer and Wiffen, above n 4, 200.

³⁵ Any proposed development needs to be formally referred to the Heritage Council by the Local Government Authority prior to planning approval and prior to a building license being issued.

³⁶ Guide to developing heritage places (2003) Heritage Council of Western Australia <http://www.heritage.wa.gov.au/b_development_referrals.html> at 2 April 2007.

Applications for approval of works are lodged with the Heritage Council and the Council has 60 days to consider the application.³⁷ The Heritage Council may then approve or refuse an application and/or impose conditions on the owner.³⁸ The Heritage Council may also require an applicant to notify the local government, or advertise the application in a newspaper or on the property.³⁹ If approval for works is not sought, or the conditions are not complied with, the Heritage Council has the power to issue a 42 day stop work order to prevent the owner carrying out work or repairs whether or not the property is listed in the Register.⁴⁰

It is an offence to damage or despoil a registered place⁴¹ or remove anything from a registered place⁴² without a permit from the Heritage Council. If a person has committed an offence under the Heritage Act, a court may, in addition to the imposed penalty, issue a restoration order that person make good any damage caused through the commission of the offence.⁴³ If the person fails to carry out the work, it can be carried out at the expense of the owner and be recovered as a debt. The ultimate order that can be made is an order to resume a heritage item.⁴⁴

³⁷ *Heritage of Western Australia Act 1990* (WA) s79(2), 79(3).

³⁸ *Heritage of Western Australia Act 1990* (WA) s79(3).

³⁹ *Heritage of Western Australia Act 1990* (WA) s79(4)(a).

⁴⁰ *Heritage of Western Australia Act 1990* (WA) s59.

⁴¹ *Heritage of Western Australia Act 1990* (WA) s79(1)(a).

⁴² *Heritage of Western Australia Act 1990* (WA) s79(1)(b).

⁴³ *Heritage of Western Australia Act 1990* (WA) s62(1).

⁴⁴ Boer and Wiffen, above n 4, 208; *Heritage of Western Australia Act 1990* (WA) s74.

B *Economic Costs: Opportunity Cost*

Restriction on property use and enjoyment have the potential to generate considerable economic disadvantage.⁴⁵ The main economic cost is the opportunity cost arising from the loss of development potential. Other costs flow from that opportunity cost including loss of market value, increased restoration costs and administrative costs.

Opportunity cost, in the context of heritage, is the opportunity forgone to obtain or retain a heritage listed building and the benefits which could be received from that opportunity.⁴⁶ As a result of stringent regulation of development activity, owners of heritage property often incur a high level of opportunity cost. This is because they are prevented from putting their land to the most lucrative use. For example, heritage listing impedes the potential return of income producing properties, either in the form of reduced rent or limited avenues for redevelopment.⁴⁷

Many heritage properties are located close to the Perth Central Business District and some stand on very valuable blocks of land. The opportunity cost on these places for renovation and redevelopment continue to rise.⁴⁸ The most extreme cases are low rise heritage buildings in the Perth Central Business District where the owners could erect a much larger building to vastly increase the property's income producing capacity.⁴⁹ Heritage listing in the Perth Central Business District stands in the way of windfall gains

⁴⁵ Amelia Simpson, 'Heritage Status in NSW: Are Private Owners Compensated Adequately?' (1997) 14 *Environmental and Planning Law Journal* 243, 243.

⁴⁶ Joshua Gans, Stephen King and N. Gregory Mankiw, *Principles of Microeconomics* (2nd ed, Victoria: Thompson) 6, 53.

⁴⁷ Peter Wills and Chris Eves, 'A Review of Australian Material regarding the economic and social benefits of heritage property' (2004) Report prepared for the NSW Heritage Office, 33, 34.

⁴⁸ Productivity Commission, above n 1, 18.

⁴⁹ Simpson, above n 45, 243, 245.

and represents a clear economic disadvantage.⁵⁰ Opportunity Cost is also present in residential properties where limitations on modification, developments or extensions can prevent owners from maximising land value.⁵¹

1 *Loss of Market value*

Commentators are not agreed on the effect of heritage listing on property values.⁵² This is because how listing impacts on property values depends on the extent to which development controls associated with listing impose opportunity costs and offset any potential benefits of being accorded official heritage status.⁵³ While under some circumstances heritage listing can have a positive impact on property values, it is clear that heritage listing normally reduces the value of properties because the loss of value reflects the constraints placed on properties by heritage listing.⁵⁴

This cost is borne by the current owner at the time of listing. Whilst the decrease in value will remain with the property whilst it is relatively constrained compared to property in a similar use and location, the cost is not borne by subsequent owners because they purchased the property at its diminished value.⁵⁵ Therefore, this is a one-off cost.

⁵⁰ Simpson, above n 45, 243, 245.

⁵¹ Simpson, above n 45, 243, 245.

⁵² Hedonic demand theory could potentially resolve this dispute. A hedonic regression equation could be used to estimate the relative decrease or increase in market value. This would involve decomposing each element of a heritage listed building and allocating it a price to construct a price index which could be compared to the price of similar properties that are not heritage listed. Analysing or constructing such a model is beyond the scope of this paper; Productivity Commission, above n 1, 136.

⁵³ Productivity Commission, above n 1, 141-142.

⁵⁴ Simpson, above n 45, 243, 245.

⁵⁵ Productivity Commission, above n 1, 139.

2 *Restoration Costs*

Additional costs also arise in the cost of extensive works that are required to renovate degraded and derelict heritage properties to the standards required by heritage agencies and to make them suitable for use. The Urban Development Institute of Australia commented that 'it would often be cheaper to rebuild a heritage listed building to its original plan than to renovate it to the standard required'.⁵⁶

In addition, heritage listing renders a building more costly to restore, renovate and maintain due to the conditions attached to the property⁵⁷ and the skilled trades people needed to undertake authentic heritage work.⁵⁸

3 *Administrative Costs*

The regulatory controls of statutory listing impose significant administrative costs that would not otherwise be incurred.⁵⁹ This includes not only the application process, but the time and effort expended in complying with the Heritage Act. For private owners these involve added 'red-tape' costs of compliance with listing.⁶⁰ For instance, certain applications discussed above, such as an application for approval of development in a planning control area made under Part 7 of the *Planning and Development Act 2005 (WA)* cannot proceed until they have been lodged with the Heritage Council as well as the relevant local authority.

⁵⁶ Productivity Commission, above n 1, 146.

⁵⁷ Simpson, above n 45, 243, 245.

⁵⁸ Productivity Commission, above n 1, 20.

⁵⁹ Productivity Commission, above n 1, xxviii.

⁶⁰ Productivity Commission, above n 1, xxviii.

C *The costs are borne by private property owners to a disproportionate extent*

As can be seen from the previous sections, the costs of heritage can be direct or indirect. The direct costs are borne by either the public sector or the private owner and include acquisition costs, conservation costs and administration costs. Indirect costs include foregone development opportunities. In theory, some of these costs can be offset by State government funding grants. However, notwithstanding these assistance programs, the costs of heritage are borne overwhelmingly by the owners of heritage places, whether voluntarily or not.⁶¹

Bureaucrats and politicians bear no budgetary cost from listing a property. The financial burden imposed upon the property owner may, by contrast, be substantial. The Productivity Commission identifies this problem as a 'disconnect' between those who decide what the community's heritage values are and those who bear the cost of providing these values when listing occurs.⁶² The lack of opportunity for the owner to have a say whether a property is listed results in the person who bears the majority of the cost having little part in and no appeal from the decision.

⁶¹ Productivity Commission, above n 1, 173.

⁶² Louise Staley, 'Heritage through property' (2006) *Institute of Public Affairs Review* 4, 5. This can be explained by the discipline of public choice theory founded by American economist and Nobel laureate, James Buchanan and Professor of Law and Economics, Gordon Tullock. Public choice theory is often referenced when discussing how individual political decision-making results in policy that conflicts with the overall desires of the general public. Heritage laws do not reflect what the public wants but what conservation and heritage groups want because the net costs are distributed among private property owners while the gains are concentrated amongst these special interest groups.

While there are State government incentives available, the vast majority of private conservation is done without adequate State government assistance.⁶³ There are heritage grant programs in place to assist with conservation works to privately owned properties already listed in the Register or eligible for entry in the Register.⁶⁴ Funding sources include the:

- (a) Heritage Council of Western Australia Grants program;⁶⁵
- (b) Lotteries Commission cultural heritage conservation grant program for not-for-profit community groups providing charitable benefit for the Western Australian community; and
- (c) cultural heritage projects program.⁶⁶

These heritage grants programs are poorly targeted, and, in most cases, are insufficient to counteract the economic burden that private owners incur as a result of listing.⁶⁷ Grants are intended to offset direct conservation expenses and will typically be awarded in amounts less than the total cost of the conservation work.⁶⁸ Ivan McDonald Architects commented that 'at no level of government is there sufficient or effective compensation or assistance for real costs incurred by the owners of heritage places'.⁶⁹ In addition, funding is largely directed towards State government owned properties or community

⁶³ Productivity Commission, above n 1, 29.

⁶⁴ J Rechner, *FAHS Heritage Handbook* (2002) Federation of Australian Historical Societies <<http://www.history.org.au/guide/>> at 14 April 2007.

⁶⁵ *Heritage Act of Western Australia 1990* (WA) s33. This section establishes the Heritage Fund which allows the Council to arrange financial assistance for the recording, conservation or preservation of a place in an area that has cultural significance that contributes to the overall sense of history of the area, whether or not the place itself is of such significance to be in the Register or subject to a Heritage agreement.

⁶⁶ *Heritage Council: An Overview* (2005) Heritage Council of Western Australia <http://www.heritage.wa.gov.au/pdfs/pubList/section2/overview_020722.pdf> at 25 March 2007.

⁶⁷ Simpson, above n 45, 243, 243.

⁶⁸ Productivity Commission, above n 1, 126.

⁶⁹ Productivity Commission, above n 1, 175.

based projects that would provide the greatest net benefit to the community.⁷⁰ For example, The Lotteries Commission of Western Australia provides grants to not-for-profit community groups based in Western Australia and providing charitable or benevolent benefit to the Western Australian community.⁷¹ The funding is between \$1 million and \$1.5 million annually.⁷² Therefore, as State government funding is inadequate to assist private owners to preserve their heritage buildings, the legal and economic costs of heritage are borne disproportionately by the owners of heritage places.

D *The costs are so great that they amount to an erosion of property rights*

It is arguable that the misallocation of costs described in the foregoing paragraphs is so great that it can result in an erosion of a private owner's rights to use and enjoy his or her property.

Heritage property owner's rights are eroded to the extent that they have substantially fewer rights than those held by their non-heritage neighbours, as heritage controls represent a substantial interference with the right to use and enjoy the land.⁷³ Placing a property in the Register involves restricting the nature and extent of the works that the owner can undertake on the property, which leads to a huge opportunity cost. Heritage property owners who have restrictions placed upon their rights to use and enjoy the land, and must constantly look for approval from the Heritage Council to conduct works,

⁷⁰ Productivity Commission, above n 1, 173.

⁷¹ J Rechner, *FAHS Heritage Handbook* (2002) Federation of Australian Historical Societies <<http://www.history.org.au/guide/>> at 14 April 2007.

⁷² Productivity Commission, above n 1, 278.

⁷³ Simpson, above n 45, 243, 243.

cannot be said to 'own' the land in to the same extent as neighbours who have none of these restrictions.

The vast majority of owners of heritage listed properties have a fee simple interest in Torrens system land. The rights eroded go to the heart of the fee simple interest, as the exclusive right to use and enjoy the land as he sees fit, within the confines of the law, is one of the right that defines the fee simple. It is important to note that all land titles in Australia are issues by the Crown and the Crown guarantees the security of title and priority of interests in the land through the Torrens Title system. Therefore no landowners have a common law right to do with their land as they wish, as every piece of land is subject to some restrictions, for example restrictive covenants.⁷⁴ Others may be given the right to possess the land, for example lessees and licensees, but they may not use the land except as sanctioned by the fee simple owner. Nonetheless, impinging upon the right to use and enjoy the land, by imposing restrictions on the use of the property and limiting the activities that can be undertaken without permission, strikes at the landowner's right in a way that other impositions, for example extra financial burden such as a tax or levy, would not. As a result, heritage listing diminishes the very interest that private property owners hold, not just its value. Consequently, heritage property owners can suffer an erosion of property rights. Louise Staley, a Research Fellow at the Institute of Public Affairs, argues that when restrictions are substantial, 'property rights exist in name only'.⁷⁵ The more uncertain property rights are, the less incentive there is

⁷⁴ Productivity Commission, above n 1, 175.

⁷⁵ Louise Staley, 'Heritage through property' (2006) *Institute of Public Affairs Review* 4, 4.

to maintain heritage assets, particularly in the long term.⁷⁶ Therefore, it is imperative that the costs of heritage are apportioned in a way which minimises or offsets this erosion of property rights.

⁷⁶ Productivity Commission, above n 1, 131.

IV WHO SHOULD BEAR THE COSTS OF HERITAGE?

The proceeding chapter established that the costs of heritage conservation are disproportionately imposed on private property owners. This chapter (a) considers the key conceptual frameworks that justify the conservation of heritage and (b) seeks to prove that a rebalancing of the costs of heritage conservation is desirable.⁷⁷ Through analysis of the public good nature of heritage protection, the conflict between the market and the conservation of heritage properties will be established. Ultimately, the chapter will argue that the community should bear more of the costs associated with heritage.

A *The Ruskin Approach to Heritage Conservation*

John Ruskin was an exponent of the theory that people do not know what is good for them.⁷⁸ Ruskin was appalled by the values and preferences of his fellow citizens and called for a central authority to impose upon individuals suitable ethical and aesthetic sensibilities.⁷⁹ He further believed that the preservation of things of beauty, such as heritage, is in the individual's best interest whether he or she knows it or not, and therefore, these individuals should be compelled to conserve heritage.

The current scheme of conservation in Western Australia often seems to be guided by this Ruskin tradition. It forces heritage protection upon individuals through imposing regulatory controls on private property owners often without consulting members of the

⁷⁷ Letter from Geoff Cooper to the Heritage Inquiry Commission, 26 August 2005.

⁷⁸ George Landow, *The Aesthetic and Critical Theories of John Ruskin* (New Jersey: Princeton University Press, 1971) 89.

⁷⁹ Greg Moore, 'Evangelical Aesthete: Ruskin and the Public Provision of Art' (2005) 37(3) *History of Political Economy* 483.

community, let alone the owners of the objects targeted for heritage listing. There is, in short, an underlying implicit assumption that individuals do not appreciate the qualities of heritage and thus if conservation was left to the community, in particular the market mechanisms of supply and demand, too few heritage features would be conserved.

However, heritage conservation need not be justified on these grounds. The assumption that individuals would not conserve heritage unless forced to do so by laws is questionable. Indeed, the rejection of the Ruskin assumption does not amount to the rejection of heritage conservation at all. A more rational argument for the preservation of heritage buildings is based on the public good nature of heritage. A more rationally justified approach to heritage conservation would ease the burden on individual property owners by (a) a more sensible allocation of economically allocating the costs of heritage conservation and (b) a more appropriate initial selection of buildings for heritage listing.

B *Public Goods and Market Failure*

1 *The Public Good Nature of Heritage Listing*

A public good is non-rivalrous and non-excludable. This means that no one can be excluded from the consumption of the good and if it is consumed by an individual, others cannot be prevented from consuming it as well.⁸⁰ A public good is therefore one that confers the same kind of benefit simultaneously on a number of persons.⁸¹ Heritage protection is a public good, because one person's enjoyment of heritage does not come at

⁸⁰ Daniel Bluestone; Arjo Klammer; David Throsby and Randall Mason, 'The Economics of Heritage Conservation: A Discussion' (Paper presented at the Economics and Heritage Conservation meeting, Getty Centre, Los Angeles, December 1998) 28.

⁸¹ E J Mishan, *Introduction to Normative Economics* (New York: Oxford, 1981) 429.

the expense of another's.⁸² And hence, an unlimited number of people can simultaneously benefit from the existence of heritage properties.⁸³

Benefits of historic heritage conservation can accrue to the owner as private benefits, as well as to the general community as public benefits.⁸⁴ Private benefits are those experienced by the owners and users of heritage buildings. These include the aesthetic benefits that arise from the use and enjoyment the owners and users receive from living in, visiting and experiencing the property. Private owners may also benefit in some situations from charging occupiers or visitors for use of the heritage property.⁸⁵

The public benefits of heritage properties are the external benefits gained by the community. These include:

- aesthetic pleasure people experience if they visit the heritage property;
- cultural enrichment through providing a sense of identity and connection to the past;⁸⁶
- educational opportunities and research values that heritage buildings provide a community;⁸⁷
- spillover effects from tourism including benefits to businesses in the precinct;⁸⁸

⁸² Joint Taskforce of Commonwealth, State and Territory heritage officials, *Making heritage happen: Incentives and Policy Tools for Conserving Our Historic Heritage* (2004) Environmental Protection and Heritage Council <www.ephc.gov.au> at 19 March 2007, 3.

⁸³ Simpson, above n 45, 243, 246.

⁸⁴ Productivity Commission, above n 1, 113.

⁸⁵ Abelson, above n 35, 6.

⁸⁶ Productivity Commission, above n 1, 11.

⁸⁷ Productivity Commission, above n 1, 12.

⁸⁸ Abelson, above n 35, 4.

- option values as people wish to preserve the property so that they or others might consume the asset's services at some future time;
- existence values as the community gains from knowing these places exist, irrespective of whether they actually visit them or intend to do so in the future;⁸⁹ and
- bequest values associated with the knowledge that the heritage asset can be endowed to future generations. A fundamental premise of heritage conservation is that heritage should be preserved for future benefit.⁹⁰

It is these public benefits that provide the main justification for adequately conserving and managing heritage properties.⁹¹

2 *Market failure in Heritage Conservation*

Market failure is the inability of a market to provide goods in a satisfactory way. It arises because occasionally resources cannot be allocated effectively through the market mechanisms of supply and demand.⁹² Public goods result in market failure. This occurs because public goods do not reflect the prices that individuals are willing to pay for the benefits they receive from the consumption of the goods.⁹³ As has been established, heritage is a public good. It is due to this public good nature of heritage that markets fail when allocating the costs of heritage conservation.⁹⁴

⁸⁹ Productivity Commission, above n 1, 16.
⁹⁰ Productivity Commission, above n 1, 121.
⁹¹ Abelson, above n 35, 7.
⁹² Bluestone, above n 80, 9.
⁹³ Bluestone, above n 80, 9.
⁹⁴ Bluestone, above n 80, 6.

When markets fail due to public goods it is a result of the free-rider problem. This occurs when a consumer can enjoy a good with non-rivalrous and non-excludable characteristics to which they have not contributed. The free-rider values the good, but the private owner has no way of capturing this value, and hence will balk at supplying this good. As many of the benefits of heritage protection are aesthetic and non-excludable, the owner generally cannot withhold enjoyment of their property from people in the community. As a result, the community rarely contributes to heritage conservation and 'free-rides' on the effort of heritage property owners. As the owner does not receive any benefits from the free-rider's appreciation of the good, the owner will under supply the good compared to the social optimum.⁹⁵ The result is that if heritage conservation was left to the market alone, it would fail to provide for adequate investment in heritage protection.

C *Allocating the Costs of Heritage*

As market mechanisms have failed to redress the costs accruing to heritage property owners, the resulting market failure highlights the requirement for non-market arrangements for its preservation.⁹⁶

The government may correct this market failure through funding this public good. Ruskin's traditional approach, with its authoritarian overtones, need not be drawn upon. Indeed, in many situations, Ruskin's approach often fails. This is because legislation that forces people to appreciate certain values generally has the opposite effect. Owners will not necessarily maintain heritage properties because an authority believes it is in their

⁹⁵ Productivity Commission, above n 1, 119.

⁹⁶ Simpson, above n 45, 246.

best interest. This demonstrates the conflict between the market and the conservation of heritage properties.⁹⁷ Once a public good model is used, the government is forced to consider the benefits that the consumer, rather than the elite, perceives. The government must consult the community more extensively before listing a property. The consumer is still sovereign, it is just that the market is not serving what he or she wants.

The market price for heritage buildings should equal the sum of the value put on its existence by all those who have an interest or reap benefit from its existence. The predicament is that the value attached to the property by the community may be substantially greater than the value placed on it by the owner.⁹⁸

This predicament raises the questions of the extent to which the government should contribute to the funding of heritage conservation. As highlighted in chapter III, in the current regulatory system the costs of conservation imposed by heritage listing are borne overwhelmingly by private owners. The schemes in place to compensate owners suffer from inherent limitations and are, in most cases, insufficient to fully counteract the economic burden that private owners incur.⁹⁹

There is an economic assumption that individuals will behave in a way that maximises their wellbeing. Using this assumption, private individuals will conserve historic heritage where they can capture the benefits from that conservation.¹⁰⁰ In many cases the private

⁹⁷ Wills and Eves, above n 47, 33.

⁹⁸ Wills and Eves, above n 47, 22.

⁹⁹ Simpson, above n 45, 243.

¹⁰⁰ Productivity Commission, above n 1, 114.

benefits of heritage are large enough to provide adequate incentives for owners to willingly bear the cost of maintaining and restoring the heritage characteristics and features.¹⁰¹ In that situation the costs are reasonable and both the private owner and community benefit from conservation.¹⁰²

Issues arise where the costs of heritage conservation are unreasonable. That is, where the costs are greater than the benefits obtained by the private owner. Unreasonable costs will only be incurred by owners whose properties are listed at the time of ownership. Property owners who acquire their property after it has been heritage listed, do so with knowledge of its listing and the associated costs and obligations. These costs are reflected in paying a lower capital price than would otherwise be the case. Therefore, any purchaser of property who buys an already listed property would not face unreasonable costs as a result of the listing.¹⁰³

It should also be emphasised that while the existence of public benefits underlies the rationale for government involvement, it does not establish the case for intervention. The existence of the free rider problem necessitates government involvement in funding heritage. In order for government involvement to be warranted, the extra benefits to the community need to be greater than the added costs of that intervention.¹⁰⁴

¹⁰¹ Productivity Commission, above n 1, 170.

¹⁰² Productivity Commission, above n 1, 113.

¹⁰³ Productivity Commission, above n 1, 240-241.

¹⁰⁴ Productivity Commission, above n 1, xx.

It has been established that heritage is a public good that imposes restrictions on property owners in the interests of the community. As the community benefits from the preservation of heritage, the community ought to be prepared to fund the cost of that protection and not expect the owners to bear the costs.¹⁰⁵ In light of the substantial benefits the community receives in heritage preservation, their contribution ought to be greater.¹⁰⁶ Louise Staley argues that 'if the community (or more accurately elected representatives and their bureaucrats) want to force private landholders to retain old buildings for the community's benefit, then the community (through taxes) should pay for the cost of doing so.'¹⁰⁷ The heritage regime in Western Australia should ensure that those owners who bear unreasonable costs in providing heritage receive adequate assistance from the community.¹⁰⁸ The socially optimal outcome is to ensure that conservation of historic heritage places occurs up to the point at which the extra benefits, which includes all community benefits, from such conservation equal the additional costs of their provision.¹⁰⁹ Where the costs of preservation are unreasonable the government will in effect only be paying for work which would not have been voluntarily undertaken by the private sector.¹¹⁰ It is government involvement in these situations that increase the social value of heritage conservation above that which would otherwise occur.

The Western Australian Government is in a position to consider the broader social benefits of heritage conservation, which are not taken into account by private decision

¹⁰⁵ Cooper, above n 77.

¹⁰⁶ Simpson, above n 45, 243, 243.

¹⁰⁷ Staley, above n 75, 4, 5.

¹⁰⁸ Productivity Commission, above n 1, 233.

¹⁰⁹ Productivity Commission, above n 1, 125.

¹¹⁰ Productivity Commission, above n 1, 125.

makers. It is important to encourage conservation which is socially valuable and yet would not be considered worthwhile from the point of view of a private property holder.¹¹¹ State government involvement will result in a net benefit to the community and will outweigh the costs of intervening to address this market failure.¹¹²

State Government involvement through funding the additional costs associated with heritage protection will encourage owners to be willing partners in conservation. Funding will overcome many of the problems associated with community objections to coercive regulation.¹¹³ The reallocation of costs appropriately would provide an incentive to actively conserve, rather than resist, the process of listing and protection.¹¹⁴

¹¹¹ Productivity Commission, above n 1, 17.

¹¹² Productivity Commission, above n 1, 157.

¹¹³ Productivity Commission, above n 1, 136.

¹¹⁴ Productivity Commission, above n 1, 223.

V RECOMMENDATIONS

The costs of providing heritage should be offset through government involvement.¹¹⁵ The current funding and incentive programs for private property owners are inadequate. Reforms to the current regulatory system are necessary and should be targeted towards property owners who incur unreasonable costs for the provision of this public good.¹¹⁶

The Western Australian government may intervene in a number of ways to provide heritage protection. These include altering the way heritage properties are identified, placing restrictions on identified places and providing financial incentives to private owners.¹¹⁷ A range of incentives are required to encourage owners in the Register to maintain the heritage value of their property.¹¹⁸

A *Government Incentives*

There is significant scope for the Western Australian government to improve identification and funding of heritage places.¹¹⁹ A system which encourages owners to conserve heritage places would be more effective than a system that imposes mandatory and prohibitory restrictions on owners. In order to encourage conservation, financial incentives will be more effective than prescriptive regulation which can lead owners to disregard, damage or degrade heritage properties.¹²⁰ This approach is expanded upon by

¹¹⁵ Commonwealth, *A National Strategy for Australia's Heritage Places: A Commonwealth Consultation Paper* (1999) 27.

¹¹⁶ Productivity Commission, above n 1, 233.

¹¹⁷ Productivity Commission, above n 1, 125.

¹¹⁸ Western Australia, *Review of Heritage of Western Australia Act: Discussion Paper* (1996) 6.

¹¹⁹ Productivity Commission, above n 1, xviii.

¹²⁰ Productivity Commission, above n 1, 221.

the Joint Taskforce of Commonwealth, State and Territory heritage officials who commented that:

Incentives must leverage private capital investment in conservation, generate additional conservation activity than would otherwise occur, counteract land use policies or other government programs that threaten heritage places and ensure that as far as possible a 'level playing field' exists between restoration work and new construction.¹²¹

Heritage incentives should ensure that owners are not unduly disadvantaged by the costs imposed upon them. Incentives should counter both prohibitory and mandatory restrictions imposed on properties and include, but not be limited to:

- grants and low interest loans for conservation work;
- stamp duty reductions;
- planning incentives and offsets;
- transfer of development rights;
- advisory services; and
- reducing compliance costs.

B *Redefining Heritage*

It is important that the best features of heritage assets are identified and preserved. A blanket approach that requires all heritage assets to be maintained in an original condition risks assets being under-utilised or destroyed.¹²²

¹²¹ Joint Taskforce of Commonwealth, State and Territory heritage officials, *Making heritage happen: Incentives and Policy Tools for Conserving Our Historic Heritage* (2004) Environmental Protection and Heritage Council <www.ephc.gov.au> at 19 March 2007, 3.

¹²² Cooper, above n 77.

Heritage listed properties are not always the magnificent buildings of last century, but are sometimes neglected properties on prime blocks of land suitable for total redevelopment.¹²³ Heritage registration should apply only to those properties which the community considers are truly unique and truly historic.¹²⁴

Therefore, 'cultural heritage significance' under the Heritage Act must be more stringently defined to prevent over-listing and ensure that what is in the Register is what the community values and wants preserved for future generations.

C *Education*

Unless the community and owners are well-informed, educated and supported it is likely that the damage to, or loss of, heritage will continue. This arises as placing a property on the Register does little to compel the owner to ensure that the heritage features are protected.¹²⁵ Education should strive to make the community aware of the advantages and disadvantages of the current regulatory system. This will allow them to make informed decisions about the future of heritage listing in Western Australia. Unlike Ruskin's approach, education in this is not forcing heritage conservation upon the public and compelling them to conserve what public interests groups believe is best.

¹²³ Wills and Eves, above n 47, 33.

¹²⁴ Wendy Hart, 'The effect of the Queensland Heritage Act 1992 on private property-owners' (1992) 9 *Environmental and Planning Law Journal* 360, 372.

¹²⁵ Productivity Commission, above n 1, 221.

D *Negotiated Agreements*

Private negotiated agreements between the State government and private owners of heritage properties will enable the owner to derive benefits from ownership whilst ensuring the desired conservation outcomes.¹²⁶ Properties should only be registered after negotiating a conservation agreement with the property owner. These agreements would address the problems identified in the current system through rebalancing the imposition of costs for conservation from individuals to the community.¹²⁷

E *Appeal*

The Western Australian Government should enable owners to appeal the inclusion of their property in the Register. Providing owners with such a right will encourage negotiated agreements where listing would impose unreasonable costs. This will result in apportioning some costs to the community where the Heritage Council considers that the community will benefit from the conservation.¹²⁸ This avenue of appeal should be available for non-government owners of all newly listed properties and for those owners of properties that were acquired before the property was statutorily listed.¹²⁹

¹²⁶ Productivity Commission, above n 1, 130.

¹²⁷ Productivity Commission, above n 1, 230.

¹²⁸ Productivity Commission, above n 1, xxxvi.

¹²⁹ Productivity Commission, above n 1, 240.

VI CONCLUSION

Heritage is a public good that reaps benefits for the community. Currently the Heritage Act, as the regulatory system for apportioning costs of heritage conservation in Western Australia, is inappropriate as private property owners bear almost all of the legal and economic costs. The arguments presented in this paper have established that, the legal and economic costs of heritage preservation are disproportionately borne by private property owners. The costs of heritage are misallocated to the extent that they result in an erosion of the rights conferred by fee simple interests in Torrens land. Therefore, a reallocation of the costs of heritage conservation is necessary.

The paper establishes that heritage is a public good that imposes restrictions on property owners in the interests of the community. The resulting market failure from heritage being a public good explains why government intervention is necessary to support heritage protection. In the current system, owners are required to preserve their heritage properties without assistance despite the high value placed on them by the community. As the community benefits from the preservation of heritage, the community ought to be prepared to fund the cost of that protection and not expect the owners to bear the costs.

The heritage regime in Western Australia should ensure that those owners who bear unreasonable costs in providing heritage receive adequate assistance from the community. If owners did not bear such and disproportionate burden of heritage costs, they would be more motivated and enthused to preserve and enhance the heritage features of their properties.

VII

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