

# Heritage through property

After being heritage listed, private property rights exist in name only.

## Louise Staley

The Productivity Commission sometimes seems to have few friends and many enemies. Whether it is Hansonites railing against its role in National Competition Policy, elements of the Left doing the same thing or various interest groups, such as conservationists, there is often someone unhappy with the Commission.

Usually the IPA is not in that camp. Often, we welcome the Productivity Commission's rational and logical approach of applying microeconomics to various problems. But, in a recent draft report into heritage conservation, *Conservation of Australia's Historic Heritage Places*, the Productivity Commission fails to address the fundamental problem with heritage conservation of private property. Unfortunately, the Commission nowhere recommends that governments (Federal, State and local) should always pay compensation to property owners when conservation-generated restrictions are imposed upon what owners can do with their own property.

Property rights advocates seem to have a bad press these days—apparently they're either no-government extremists or hopeless utopians, pinning for a non-existent time when property owners were completely free to do whatever they wanted with their own property. But these questions are not merely theoretical. Evidence was provided to the Productivity Commission of what occurred to a couple who purchased a 1960s former display home in

Sydney. The couple were stopped from demolishing it or even substantially renovating it.

Another owner of a house said:

Control of my property has been usurped and I am an unpaid public servant. There is no offer to waive or reduce rates.... If I fill out all the innumerable forms correctly ... I may be considered to be eligible for a grant of up to a maximum of \$1,500. The whole process is intolerable and undemocratic. Why should my property be treated differently to another next door? Why should I have to bear the burden of the additional costs and loss of rights to do with my property that have been imposed through its Heritage Listing?

In parts of Parkville, Victoria, some owners of Victorian terraces are required to use 'heritage' colours when repainting, despite the fact the houses have been painted white for 30 or more years. To avoid having to paint their house a dirty brown, the owners undertake frequent 'maintenance' and discreetly repaint small parts white. These are but a few of the many types of restrictions that owners of heritage-listed properties face. Restrictions arising from heritage listing can range from stipulating what colour a house can be painted to whether security features can be installed, or the permissible extent of renovations, including of gardens, through to demolition and redevelopment restrictions.

The Productivity Commission has proposed that the only way a property can be 'heritage listed' (that is, have restrictions imposed about what can be done to the property) is if the owner and the listing authority agree to a

conservation agreement. This means that listing can only happen with the property owner's consent and that the listing only stays in effect as long as the property owner agrees. While such a proposal is consistent with a property rights approach (listing becomes, in reality, voluntary, for private property owners), it fails to account for situations where no agreement can be reached and where there are political reasons for the listing authority to act. In these circumstances, there must be legislated compensation for private property owners when there is forcible listing of private property on heritage registers.

Under the Constitution, the Federal Government must offer compensation when it compulsorily acquires property. State governments and local councils are not bound by the same requirement. In a narrow interpretation of this provision, the Federal Government would have to pay compensation if it confiscated a building from a private owner. In the case of heritage controls, however, the actual title to the property usually remains in private hands, but the owner is subjected to varying degrees of regulation which devalue the property. When this devaluation is substantial, property rights exist in name only. To a large extent, the government has expropriated a significant portion of the value of the property without compensation. For property rights to have meaning, compensation should be paid when use is heavily restricted, not simply expropriated. Additionally it should apply to all heritage listing, not only those undertaken by the Federal Government.

By proposing a scheme of voluntary listing, the Productivity Commission clearly intends it to be an incentive

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Should this 1960s home in Sydney eligible for heritage listing?  
House (For Craftbuilt Homes), La Trobe Picture Library Collection, State Library Victoria

to governments to compensate owners properly, so that private owners would be willing to enter into conservation agreements. However, by choosing to recommend voluntary listing—essentially giving property owners the negotiating power to opt out—it is almost certain that the heritage lobby (the various National Trusts and heritage officers and consultants in Councils) will aggressively oppose the report. With an emotive subject such as Australia's heritage, undoubtedly the heritage interests will win the debate and the Commission's recommendations will be forgotten.

Heritage protection of private property in Australia suffers from many ills. In most States, Federal, State and local governments all have some responsibility for heritage protection and, as occurs in other policy areas, the different levels of government have different resources available to apply to the problem. As a result, the Commonwealth, with the greatest resources, commonly uses conservation agreements which, in effect, set out a framework for the Commonwealth partially to compensate private property holders of heritage buildings by paying for some or all of the repairs and maintenance of proper-

ties on its register.

By contrast, the States do not tend to use such mutual agreements. In NSW, for example, there are 1,498 places on the State heritage register, but only three conservation agreements. Instead, the States rely on prescriptive regulation. Bureaucrats and politicians bear no budgetary cost from listing a property, despite the fact that this may place massive financial burdens on the property owner.

The Productivity Commission has correctly identified 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'. Naturally, this leads to a strong incentive to 'overlist' properties, as there is no penalty to the government for doing so.

Local councils can be even worse than State Governments in this regard. Most do not have the option of conservation agreements; their only instrument is heritage controls through the planning process. Councils can apply heritage overlays or controls to entire streets or suburbs which affect all properties within the area—even if an individual property is not worthy of

heritage conservation. Again, there is a gap between those who pay (individual property owners) and those who decide (councillors and council officers).

Local government requires far lower levels of heritage value to gain listing. To be listed on the national register, the property must have international or national significance (for example, the Royal Exhibition Buildings in Carlton or the Sydney Opera House). To gain a State listing, it needs State-wide or regional significance. But to make it on to a local list, a property needs only to be within a suburb with heritage features. In some cases, whole suburbs are listed as a way for the council to circumvent State medium-density planning policies. Too bad if your fibro shack is devalued through the process—there is no provision for compensation and, in some States, no capacity to appeal against the listing.

The result of this regulation-without-compensation approach is predictable. Affected landowners go to extraordinary lengths to avoid the controls, either by letting buildings deteriorate to such an extent that all heritage value is lost and they are condemned, or by illegally bringing in the bulldozers at midnight and risking the consequences.

Many of the ills of over-listing and under-preservation would disappear if governments were forced to pay compensation to property owners for devaluing their holdings. This is the traditional property rights argument which is out of favour among governments and many other meddlers—but one which it might have been expected that the Productivity Commission would advocate. If the community (or, more accurately, the elected representatives and their bureaucrats) want to force private landholders to retain old buildings for the community's benefit, then the community (again, more accurately, taxes) should pay for the cost of doing so.