Redundant sites and buildings: a legal perspective

The Inter-Governmental Agreement on the Environment was signed on 25 February 1992 between all Commonwealth, State and territory governments and the Australian Local Government Association, on behalf of all local governments. The agreement provides that sustainable development should form the basis of future policy approaches to environmental management. In accordance with the agreement, the principle of sustainable development has been embodied in the objectives of the Queensland Heritage Act 1992 and will no doubt be incorporated in heritage legislation in other states as it is reviewed.

Sustainable development is defined in the agreement as development which meets the needs of the current generation, without compromising the ability of future generations to meet their own needs. The principle of sustainable development requires that heritage places continue to be used in order to conserve their heritage value. The redundancy of a heritage place will inhibit the conservation of its heritage value and is therefore contrary to the principle of sustainable development.

Since all levels of government have committed themselves to the principle of sustainable development in the Inter-Governmental Agreement on the Environment, it is incumbent on all governments to ensure that heritage places are not left redundant. There are a number of broad strategies available to governments to address the problem of redundancy. Generally speaking, these focus on the protection of heritage places from damage, the reform of development and the conservation approvals processes, integrated planning of heritage places, and financial assistance.

These strategies are intended to avoid redundancy and to facilitate the re-use of redundant heritage places. This paper examines the various policy options that are available to governments to implement these strategies and where necessary, recommends appropriate legislative and administrative changes.

Protection of heritage places

In order to avoid redundancy or to facilitate the re-use of redundant heritage places, it is imperative that heritage places be protected from damage. To ensure the protection of heritage places, heritage legislation must contain at least three elements:

- A prohibition against damage to heritage places.
- Significant penalties in the event of damage to heritage places.
- An obligation to maintain heritage places.

Damage to heritage places

Most heritage legislation in Australia prohibits heritage places from being developed, demolished, damaged or altered without approval. Additionally, heritage legislation in some states restricts the power of heritage authorities to approve proposals which would adversely affect the cultural heritage significance of a place. For instance, the Queensland Heritage Act provides that the Queensland Heritage Council can only approve a proposed development which would destroy or substantially reduce the cultural heritage significance of a heritage place, if there is no prudent or feasible alternative to carrying out the development.

In cases involving the adaptation of redundant heritage places for new uses, it is important, at least in Queensland, to determine whether there is any prudent and
feasible alternative to the new use. The phrase 'prudent and feasible' has been taken from United States transport legislation. The meaning of this phrase has been considered by United States courts, which have held that 'feasible' means capable of being built on or being made to work with available technology; whilst an alternative is said to be prudent if it does not present unique problems. It is considered that the tests enunciated in the United States cases are likely to be applied in Queensland.

**Penalties for damage**

Furthermore, most heritage legislation provides substantial penalties where a heritage place is damaged without approval. For instance, monetary penalties of up to $1 million are provided for in the Queensland Heritage Act. Heritage authorities in Queensland and New South Wales are also empowered to require offenders to restore the damaged heritage place or to forbid development of the land for a period of up to 10 years.

**Maintenance of heritage places**

Unfortunately, heritage legislation does not require the owner to keep a heritage place in good condition or to restore the heritage place if it has been degraded. Generally speaking, owners are only required to comply with the public safety standards which apply to all buildings. However, these obligations have been extended in New South Wales and Victoria where owners are deliberately allowing a heritage place to deteriorate with the intentions of allowing demolition or redevelopment. Where a heritage place has been willfully neglected, the heritage authority may prosecute the owner and order the undertaking of repairs to prevent further deterioration. If the repairs are not carried out the heritage authority can compulsorily acquire the land or forbid the development of the land for up to 10 years.

Unfortunately, there are difficulties associated with proving the owner wilfully (that is, deliberately) neglected the heritage place. The relevant test is subjective rather than objective, requiring an examination of the individual owner's state of mind. It is recommended that these provisions be amended to empower the heritage authority to direct owners to undertake specified maintenance work or to carry out the necessary work at the expense of the owner.

**Reform of approvals process**

The approvals process applicable to the conservation and development of heritage places should also be reformed to minimise uncertainty, costs, delay and risk to the owners of heritage places. This involves a number of specific reforms.

**Integrated approvals system**

The approvals systems contained in heritage legislation should be integrated with the approvals system specified in land-use planning, pollution control and natural resources legislation. At minimum this would require the inclusion of heritage protection as an objective and decision making consideration in all land-use planning, pollution control and natural resources legislation. At maximum it would require the amalgamation of land-use planning, pollution control and natural resources legislation into one Act. As such, it would provide a comprehensive Act, clarification of responsibilities and an integrated system. However, the amalgamation of these Acts into one would require
major legislative and administrative changes. Accordingly, it is recommended that other approvals systems should be amended to include heritage considerations.

**Protection mechanism**

The mechanism by which a heritage place is brought within the ambit of heritage legislation should also be reformed. Heritage legislation should provide for the establishment of a single, publicly accessible register that indicates all heritage places, whether owned by the Crown or private owners. The process by which places are included in the register should also be specified in the heritage legislation. This process should include public participation mechanisms. This system of registration has been adopted by most states, with the notable exception of New South Wales, which still retains the process of making conservation orders. It is recommended that a system of registration incorporating public participation mechanisms be implemented.

**Assessment of economic values**

The process of determining whether a place should be included within a heritage register requires an examination of both the conservation and development values of the place. Not only will this potentially reduce the conflict between owners and the heritage authority, but it is also mandated by the concept of sustainable development. In New South Wales and Victoria, owners are entitled to object to the inclusion of a place within the ambit of the respective heritage legislation on a number of economic grounds including that:

- It is unnecessary to the conservation of the place.
- It would render the place incapable of reasonable or economic use.
- The conservation of the place could not be achieved without undue financial hardship to the owner.
- The preservation of the place is not economically feasible.

In Queensland, however, owners are only entitled to object under the Queensland Heritage Act to the inclusion of a place on the heritage register on the grounds that the place is not of the requisite conservation value. This right of objection is expanded by a further provision of the Act which provides that a place is not of the requisite conservation value if there is no prospect of the conservation value of the place being conserved. The meaning and rationale of this provision is not clear from the Act and was not properly articulated in the second and third reading speeches of the minister.

Despite the uncertainty associated with the provision, it may be possible to argue that a place does not have the requisite conservation value if the owner does not have the financial capacity to maintain the place in a manner necessary to conserve its conservation value. It is uncertain whether such an argument would succeed before a court. What is certain is that if economic matters are to be considered in the process of determining whether a place should be included in the heritage register, then they should be expressly articulated. However, if it is the case, as I suspect it is, that economic matters are not intended to be considered in the registration process, at least in Queensland, then it would appear that the Queensland Heritage Act is inconsistent with the principle of sustainable development and will promote conflict between owners and the heritage authority.
Assessment of construction values

Heritage legislation should also ensure that the conservation of a place is properly assessed before its inclusion on a heritage register. This should include an assessment of the cultural significance of the place in terms of both the nature of the significance and the degree of significance. This is the case under the Queensland Heritage Act where a place is required to be of cultural heritage significance and to satisfy one of eight criteria, before it is entered on the heritage register. Legislation in most other states focuses only on the nature of the significance of the place. Accordingly, in these jurisdictions the only requirement for inclusion in the register is if the place is of cultural significance. It is recommended that heritage legislation require an assessment of both the nature of the significance and the degree of significance of a place before its inclusion on the heritage register.

Heritage legislation should also define more particularly the nature of the significance and the degree of significance that is required for a place to be included on the heritage register. In most jurisdictions the nature of the cultural significance required for registration is defined in accordance with the Burra Charter to mean a place of aesthetic, historic, scientific or social value for past, present or future generations. This definition is very wide; as are the criteria which are adopted in Queensland and Western Australia to define the degree of significance required for registration of a place. Not only has this resulted in uncertainty for owners, but the courts, recognising the significant constraints imposed on the property rights of owners by heritage legislation, have interpreted these provisions strictly. This is illustrated in the recent case of Advance Bank Australia Limited v Queensland Heritage Council (Unreported 19 November 1993). In that case the Queensland Planning and Environment Court held that the reference in the definition of cultural heritage significance to:

- 'The present community and future generations' means the whole of Queensland and not a limited area of Queensland.
- 'Historic' means an event of particular significance as distinct from the word historical which refers to an event that occurred in history and is part of the historical process.
- 'Aesthetic' means pertaining to the sense of the beautiful or having a sense of beauty and does not include architectural values such as style or utility.
- 'Social' means a relationship to people or human society being the people of Queensland and not the residents of a particular part of Queensland.

On the basis of this interpretation the court held that the place in question, Ascot Chambers, was not of heritage significance and should not be entered on the register. The decision calls into question the legality of other places included on the register on the basis of a more expansive interpretation of the concept of cultural heritage significance.

The decision is also of significance to other jurisdictions which have adopted the definition of cultural significance contained in the Burra Charter. Accordingly, it may be necessary for heritage authorities to review heritage places included on their respective registers to ensure that they satisfy the definition of cultural heritage significance as interpreted by the Queensland Planning and Environment Court. Therefore, it is recommended that the concept of cultural heritage significance and the relevant criteria for determining the degree of significance of a place be defined with as
much care and precision as possible, and that guidelines be developed to assist in the interpretation of those provisions.

**Development approvals process**

Heritage legislation should provide for a development approvals process in respect to heritage places which is simple and minimises delay and costs. To achieve these aims the existing development approvals process should be reformed in a number of ways:

- Development approval should not be required from a heritage authority where the proposed development complies with certain performance standards specified in respect of the heritage place.
- Development approval should not be required from a heritage authority in relation to certain specified works such as maintenance, minor repairs, gardening maintenance or agricultural activities which are consistent with the preservation of the conservation value of the place.
- Heritage authorities should delegate their power in respect of specified categories of minor applications to officers or, where possible, local authorities.
- Guidelines similar to those in New South Wales should be prepared to assist owners in the preparation of conservation studies and plans and the preparation of development applications in respect of heritage places.

**Integrated planning of heritage places**

The reform of the conservation and development approvals process contained in heritage legislation should be complemented by an integrated planning strategy for heritage places. This strategy should be prepared and implemented by heritage authorities and should include the following components:

- The protection of heritage areas to ensure the integrity of individual heritage places is not affected by a decline in the fabric of surrounding places.
- The presentation of awards to owners who have taken steps to avoid the redundancy of heritage places or to facilitate their re-use.
- The revitalisation of town centres with funds from the Commonwealth’s Main Streets Program or other appropriate programs.
- The provision of advice and technical assistance to owners in respect of the conservation and development of heritage places.
- The relaxation of existing building requirements which, if implemented, would adversely affect the fabric of the heritage place or its significance.
- The implementation of development incentives designed to avoid redundancy or to facilitate re-use.

These generally involve an increase in the development potential of a heritage place or related land, and generally take the form of increases in plot ratio or gross floor area, the relaxation of development standards such as car parking requirements or transferable development rights. Development incentive systems have been implemented by city councils in Adelaide, Melbourne and Brisbane.
To date, heritage authorities have avoided the use of other planning incentives involving increases in the range of purposes for which heritage places may be developed under planning legislation or, for that matter, under heritage legislation. This can probably be related to problems associated with determining which uses are compatible with the cultural heritage significance of the heritage place. As was recently illustrated by the proposal to use the Treasury building in Brisbane for a casino, views may vary greatly as to what is a compatible use, particularly amongst heritage experts.

However, if the objective is to avoid redundant places or to facilitate the re-use of redundant places, heritage legislation should allow maximum flexibility to adapt redundant buildings to new economically viable uses. In this context, heritage authorities and their consultants will be increasingly required to make difficult choices between redundancy and the gradual degradation of the fabric of a heritage place on the one hand, and on the other hand, a new commercially viable use which will facilitate the conservation of the fabric but which will adversely affect the cultural heritage significance of the place.

Heritage agreements between owners and heritage authorities are generally provided for in most legislation. Unfortunately, their effectiveness is limited by the fact that heritage authorities are not in a position to offer any real benefits to an owner to enter into such an agreement. In the absence of direct financial assistance, the only benefits may be the remissions in rates and land tax brought about by a reduction in the value of land. However, as discussed later in this paper, it is likely that an owner would be entitled, in any event, to seek a reduction in the valuation of the heritage place, in accordance with general valuation principles.

**Financial assistance**

Unfortunately, the strategies discussed in this paper will not be effective in preventing the redundancy of heritage places or facilitating the re-use of redundant places unless they are supplemented by other financial assistance schemes.

It is necessary that all levels of government implement incentive programs aimed at assisting in capital investment in, and maintenance of, heritage places. A number of options are available to government.

The *Commonwealth Income Tax Assessment Act 1936* should be amended to provide tax concessions and credits, rebates for conservation and restoration work, accelerated depreciation allowances for capital works on renovation, and deductibility for donations towards heritage conservation works. The Act should also be amended to alleviate the capital gains tax payable upon a transfer of development rights.

Despite the rigidities of the current tax system, this year's federal budget provided that approved work on heritage places is eligible for income tax deductions. Under the scheme, to be capped at $1.9 million per year, owners of heritage places will be able to apply through a competitive selection process for income tax rebates of 20 cents in the dollar. Conservation works must be valued at more than $10,000 and must relate to heritage places that are visible or are accessible to the community. The scheme is expected to generate approximately $9.5 million in heritage conservation works each year.
Grants may be made directly by heritage authorities to finance conservation works. In this regard it is recommended that the National Estate Grants Program, administered by the Australian Heritage Commission, be extended to private owners.

State governments have also provided interest-free loans and low-interest loans to owners, as well as subsidies to mortgagees to encourage conservation works on heritage places.

Heritage authorities are usually empowered to purchase property or compulsory acquire property in certain circumstances. Interestingly, the Queensland Heritage Act does not empower the Queensland Heritage Council to acquire property.

Heritage legislation sometimes provides for revaluation of heritage places. For instance, under the Queensland Heritage Act the Valuer General is required to consider the restrictions on use contained in a heritage agreement when assessing the unimproved value of a heritage place. However, where heritage legislation does not provide for the revaluation of a heritage place, regard must be paid to general valuation principles.

The valuation principles applicable to heritage places have recently been enunciated in a series of cases involving heritage places in Queensland. These cases are the Queensland Club v The Valuer General, Robert W. Mathers and Robert F. Gibson v The Valuer General and The Valuer General v Ballow Chambers Limited. In having regard to the development restrictions contained in the Queensland Heritage Act, the court held that in circumstances where the owner is clearly obliged to sell the heritage place subject to statutory constraints preventing or significantly impeding the demolition of the building and development of the site, that heritage place should be valued on the basis of its actual use rather than its highest and best use. It is likely that these principles would be applicable to the valuation of heritage places in other jurisdictions.

Owners may also be granted remissions in rates and land tax to assist in the construction of the heritage place. These may occur either through direct discounts or by a reduction in the valuation of the heritage place in accordance with the principles previously discussed.

**Conclusion**

The continuing use of heritage places is essential to the conservation of the heritage value of these places. Therefore, it is imperative that governments adopt strategies which avoid redundancy or facilitate the re-use of heritage places. It is essential, however, that government initiatives should be as flexible as possible so that legal and policy options may be tailored to satisfy the requirements of individual heritage places and their owners. Finally, it should never be forgotten that our heritage places will be in jeopardy if it is not economically feasible to maintain them and that it is in this context that appropriate policy and legal options should be implemented.
references


