

THE HERITAGE OF WESTERN AUSTRALIA ACT 1990 AND CULTURALLY SUSTAINABLE DEVELOPMENT

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INTRODUCTION

This essay analyses the provisions of the **Heritage of Western Australia Act, 1990** (the Act) by reference to the concept of Sustainable Development. It is suggested that this concept must be applied to our built environment as well as the natural environment. This proposition turns on the premise that only laws which clearly entrench sustainable development as their objective will have a meaningful role to play in better resolving the conflict between development and the environment. This essay attempts to evaluate how far the Act conceptually and administratively is consistent with the concept of Culturally Sustainable Development.

For the purposes of this essay, cultural heritage is given a limited meaning and refers to the built heritage of European and other non-aboriginal cultures. This definition reflects the narrow focus of the Act which implicitly excludes natural wilderness areas and Aboriginal heritage.

The term "*Cultural Heritage*" is used instead of "*environment*" or "*resources*" for the sake of consistency with the Act.¹

SUSTAINABLE DEVELOPMENT

The report of the World Commission on Environment and Development (The Brundtland Report) has focused the international community's attention on the concept of "*sustainability*" as a means of resolving the conflicting goals of economic growth and ecological preservation. In Australia, Sustainable Development forms the cornerstone of the present Federal Government's policy on the environment. This policy has been recently articulated in the Intergovernmental Agreement on the Environment and a Commonwealth Discussion Paper on a Draft National Strategy for Ecologically Sustainable Development.² It is defined as development "*which meets the needs of the present generations without compromising the ability of future generations to meet their own needs*".³ Thus, it is development which embraces the notion of Intergenerational Equity and Responsibility. The Brundtland Report also stresses that economic growth and ecological preservation are not mutually exclusive goals and provided nations undertake comprehensive institutional reforms, these goals can be married in practice. Therefore, an essential prerequisite for Sustainable Development is the merger of environmental and economic considerations at all levels of the decision making process.

CULTURALLY AND ECOLOGICALLY SUSTAINABLE DEVELOPMENT

The focus of the Brundtland Report and recent Commonwealth initiatives is on the natural environment and the pursuit of ecologically sustainable development, rather than the protection of Cultural Heritage. This reflects the paramountcy of addressing timely global ecological problems that may jeopardise human progress and survival. In comparison, the preservation of our cultural built heritage lacks the same urgency. Furthermore, although cultural heritage is part of the environment in a broad sense, it is dissimilar to the natural environment in that it lends itself to a prioritisation of places for conservation. In contrast, the natural environment is arguably an indivisible thing and holistic conservation approaches must be undertaken to preserve it.

Nonetheless, two important similarities exist between the natural environment and our Cultural Built Heritage:

- the general community attach great value to both and support their preservation; and
- they are finite, increasingly endangered and irreplaceable resources.

It is suggested that these two similarities warrant the adoption of a common objective for environmental laws that protect either the natural or the cultural aspects of our environment. The concept of sustainable development which we recognise must apply to our ecology, should also apply to our buildings. Therefore, Environmental Laws governing our cultural built heritage must encourage "*culturally sustainable development*".

This is taken to refer to development which meets the economic needs of the present without compromising the cultural needs of present and future generations. At a minimum, culturally sustainable development must not endanger the preservation of those buildings which provide the tangible evidence (and contribute to our understanding) of the past, enrich the present and will be of value to future generations. This is because our Cultural Built Heritage does more than simply contribute to the aesthetic of our cities. It fulfils our community's psychological need for continuity in our urban environment, providing us with a sense of stability and control over progress, and preserves those places that are familiar, popular and valued. Ultimately, the reason for incorporating sustainability concepts into our cultural heritage laws is because "*the preservation of Australian national heritage (such as) historic buildings and works is as important to the quality of life of present and future generations as is the preservation of notable natural features*".⁴

OBJECTS OF THE ACT

The carefully stated objects of the Act appear to embrace the concept of Culturally Sustainable Development. In section 4(2) the principal objects of the Act are to:

- 1 identify, conserve and enhance places of cultural heritage significance in Western Australia;
- 2 facilitate development that is in harmony with the cultural heritage values of an area; and
- 3 promote public awareness of cultural heritage."

These objects are expressed to be undertaken "*with due regard to the rights of property ownership*". This rider suggests that under the Act, the Public Interest of conserving Cultural Built heritage is to be accommodated with the interests of all property owners wishing to capitalise on their investment.

But whilst the Act's objectives are encouraging, they merely beg the question as to how the Act provides a sufficiently certain legal framework for simultaneously pursuing the conservation of cultural heritage and property development. The answer is to be found in the Act's definition of key terms such as conservation, development and cultural heritage significance. These definitions are the legal standards which ultimately enable the identification of development which is, or which is not, sustainable. Conversely, they provide the threshold test for the protection of cultural heritage which administrators must apply. Any failure to adequately define the meaning of these key terms will limit and jeopardise the degree of regulatory control over our Cultural Heritage.

CONSERVATION AND DEVELOPMENT CONCEPTS

Conservation and Development have traditionally been perceived as antithetical concepts by parties to environmental disputes. This is because such disputes are commonly perceived as being "*zero sum games requiring an either-or, develop or not develop outcome*".⁵ And the parties to the dispute, whether they be property owners hoping to capitalise on their investment or concerned urban environmentalists, often pursue their objectives with fundamentalist zeal. "*Sustainability*" attempts to realign these opposing concepts and marry controlled development with preservation. Thus, legal definitions in relation to built heritage need to accommodate the possibility of a whole spectrum of consequences including:

- total conservation and preservation of buildings that precludes any development;
- partial remodelling of buildings to accommodate minor development;
- major development coupled with partial preservation; and
- full demolition and development.

The definition of development under S.3(1) is a comprehensive one. It deals with almost any act which can occur on any piece of land and provides the scope to deal with a range of developmental options.⁶

Conservation is defined in terms of the management of a place in a manner that will:

- "a) enable the cultural heritage significance of a place to be retained; and*
 - b) yield the greatest sustainable benefit for the present community without diminishing the cultural heritage significance of that place;*
- and may include the preservation, stabilisation, protection, restoration and reconstruction, adoption and maintenance of that place in accordance with relevant professional standards."*⁷

This definition anticipates the full range of developmental alternatives listed above. The Act does not approach the preservation of cultural heritage as an *"all or nothing"* pursuit whereby heritage buildings become our Cities' Museum pieces. Instead, the definition of conservation expressly incorporates sustainability. Conservation and development are being integrated conceptually. The result is that heritage can be pragmatically utilised to provide economic benefits to the community. The Old Swan Brewery development is a notorious example of the Act's *"Conservation"* put into practice.⁸

THE CONCEPT OF CULTURAL HERITAGE SIGNIFICANCE

The term Cultural Heritage Significance is the focal point to the objects and functioning of the Act. Primarily it provides the criteria for assessment of heritage values, so the decision as to whether a place is *"preserved"* or *"developed"* turns on the subtleties of the definition. Section 3(1) defines the term:

*"In relation to a place the relative value which that place has in terms of its aesthetic, historic, scientific, or social significance for the present community and for future generations."*⁹

The definition of Cultural Heritage Significance has two important aspects. First, it reverentially incorporates the concept of a *"place"*, the definition of which indicates the scope of the Act. The definition of a place is:

*"an area of land sufficiently identified by survey or description and includes any works or buildings situated there, their contents ... and such of their immediate surroundings as may be required for the purposes of conservation of those works or buildings."*¹⁰

The focus of the Act therefore, appears to be buildings, but it is broad enough to incorporate other built structures such as bridges as well as archaeological sites, landscape areas and cultural precincts.¹¹

The most important and difficult aspect of the definition of Cultural Heritage Significance is that it is underpinned by the notion of value. It is the *"value"* of a place which accords it *"significance"*. But the notion of *"value"* does not easily lend itself to statutory definition. Value is a reverential and subjective concept. For example, when we speak of the value of a building we mean the worth, desirability, or utility of a thing by reference to some other standard or point of reference. As individuals or a community, we make subjective judgements as to what it is we value by reference to criteria we think are important. Consequently administrative decisions as to the value of a place made under the Act will consistently provide debate if not fervent opposition. Indeed, the problem of balancing values is one aspect of the challenge of sufficiently defining sustainable development so that our laws achieve the conservation of cultural heritage. The value of preserving a heritage place will often be in direct conflict with the values of developing the site on which that building rests.

Furthermore, heritage protection may increase the real value of a house or it may decrease the market value of the land it is on by restricting development.

The bureaucrat is, therefore, faced with the following questions when attempting to determine the cultural heritage value of a place:

How valuable is this place to the community?

- What aspects indicate its value?
- Whose values do we apply?
- Who decides what criteria are chosen?
- How are they applied?

The definition of Cultural Heritage Significance addresses the first four questions. It explains the significance or value of a place in relation to aspects of human intellectual endeavour such as the arts, history, science and sociology. The threshold for protection of our built heritage is therefore dependent on multi-disciplinary evaluation. Moreover, the Act is creating a conceptual framework which regulates the estimation of the value of heritage by incorporating the notion of intergenerational equity. This provides a sufficiently cogent legal standard by which “*sustainability*” can be identified. That is to say - it enables the comprehensive analysis of the value of a place and thereby permits judgements to be made as to the extent (if any) of development that should be allowed. It is, therefore, suggested that the Act is conceptually consistent with the objects of culturally sustainable development.

The entrenchment of the fundamental aspects of sustainability into the Act’s key terms provides a firm conceptual basis for the integration of conservation and development priorities. It remains to be considered whether the administrative structures set up by the Act, such as the Heritage Council and the Register of Heritage places, are consistent with this purpose.

THE HERITAGE COUNCIL

FUNCTIONS

Section 5 of the Act establishes a Heritage Council of nine persons. The Council is essentially an advisory body that assists the Minister for Heritage, in whom is vested the responsibility for administration of the Act. The Council’s functions are set out in Section 7 and include:

- advising the Minister on all matters relating to places that have or may have cultural heritage significance and their recording conservation presentation and use;
 - preventing destruction or damage to heritage places;
 - maintaining a register of heritage places; and
- encourage public interest and understanding of cultural heritage and its conservation.

Clearly the Council’s stated emphasis is on conservation, but its advisory nature limits any fundamentalist pursuit of that goal.

FUNDING

For the Council to successfully perform its function it must have the appropriate resources and funding. The Council’s Federal counterpart, the Australian Heritage Commission, has wide jurisdiction over national, cultural and natural heritage, but has struggled to retrieve the resources that were first contemplated to fulfil its role.¹²

However, the Council is largely responsible for managing its own resources which, by virtue of the Heritage Conservation Fund, give it more financial independence than the National Heritage Commission. The Council has power to accept gifts and bequests, establish schemes of endowment and trusts, make charges and impose fees in relation to activities and places controlled by the Council.¹³ The latter seems to include the revenue from substantial fines which may be imposed under the Act or the regulations.¹⁴ In turn the fund can be used for financing the varying activities of the Council such as conservation education programs or the acquisition of places of cultural heritage significance.

MEMBERSHIP

Given that Cultural Heritage issues are a matter of community concern, it is essential that advisory bodies such as the Council be broadly representative and qualified to provide credible and consistent advice on Heritage Significance.¹⁶ If Culturally Sustainable Development is to be achieved, the membership of this administrative body must reflect the cross section of interest groups and not be subject to manipulation by the Minister or the government.

The Act entrenches nomination procedures from a broad range of interest groups in the community to ensure that the Heritage Council is broadly representative. However, the Heritage Minister is the person who ultimately chooses the members. The members of the Council are (under Section 19(1)) formally appointed by the governor on the Minister's recommendation for a period of five years.¹⁷ Four members must be recommended from persons having qualifications expertise or interest in the functions of the Council.¹⁸ Individuals or interest groups may make representations to the Minister in support of a person's appointment.¹⁹ One member must be put forward by each of the following:

- local government interests;
- groups reflecting owners interests; and
- professional organisations with skills relevant to the conservation of cultural heritage.²⁰

The chairman is simply recommended by the Minister whilst a ninth member is directly nominated onto the Council by the National Trust of Australia (WA).²¹

The composition of the Council and the entrenchment of procedures to select specific interest groups is consistent with the concept of sustainable development. It encourages the participation of citizens in the implementation of decisions and elaboration of policies and priorities. However, the Minister's ability to select Council members does not render the Council immune from political manipulation so that it might pursue either a pro-conservation or pro-development agenda. Whichever fate befell the Council, it would not be consistent with the aim of culturally sustainable development.

POWERS OF THE HERITAGE COUNCIL AND THE MINISTER

The powers of the Council are generally circumscribed by those of the Minister administering the Act, who may issue written directions to the Council under Section 6(2) and the Council is bound to give effect to them. A notable exception exists in relation to the actual evaluation of the Cultural Heritage Significance of a place. In practice, the Council co-opts professional or technical consultants in preparing a report. Under Section 6(3) the Minister cannot impose his views on the Council so that a building or precinct has no significance when multi-disciplinary research has led the Council to conclude otherwise.

The powers of the Council are also circumscribed when undertaking the assessment of the cultural heritage significance of a place. It is obligated to notify the owners of a place, the occupiers, the local Council of the municipality in which the place is situated and any other person likely to be affected.²² If submissions are made to the Council by notified persons or by any other person with "*special knowledge of or interest in the place*", then the Council must consider all the submissions in their final assessment.²³ Likewise when the Minister ultimately exercises his sole discretion to enter a place into the Register of Heritage Places he or she must have regard to any advice, report or recommendation given by the Council in relation to submissions that have been made.²⁴ It would appear that the Act is, in this instance, consistent with the objects of sustainability. It is encouraging the integration into the decision making process of the views of those groups represented on the Heritage Council and the disparate views that may be expressed in other submissions made to the Council.

RECORDING OF HERITAGE PLACES

Property development and its economic benefits in the State can only be encouraged if potential investors can ascertain with certainty the heritage implications of a project or proposal. Therefore, the

comprehensive documentation and recording of heritage places is a fundamental pre-requisite for legislation seeking to provide culturally sustainable development. The Act does so in three ways:

- at the municipal level, Councils are required to compile and maintain an inventory of buildings within its district which, in its opinion are, or may become, of Cultural Heritage Significance;
- the Council is charged with the duty of compiling and rewriting a comprehensive database of places which may have Cultural Heritage Significance. Reports of places on the database are then sent to local Councils, the Department of Lands, and where practicable to the owner²⁵; and
- the Council is further required by Section 46(2) to compile a Register of Heritage Places.

The Act expressly states that this register is intended to be a comprehensive list of place throughout the State that meet the criteria. It is not intended to be merely an index of examples.²⁶ Registration may be permanent or interim and a property may be deregistered.²⁷ But once a property is registered a memorial must be lodged on behalf of the Council with the executive director of Land Administration and the Registrars of Titles, Deeds and Transfer.²⁸ Upon registration, the Council is also under a duty to inform all parties with "a continuing interest" in a place and the public authorities responsible for planning. This duty involves making those persons aware of all information in relation to that place and of the provisions of the Act. In particular, parties with a continuing interest would be informed by the Council of Section 11(2) which puts all public authorities under a duty not to act (or refuse to act) in a way which would adversely affect a registered place.

The task of protecting our built heritage and promoting sustainability is therefore shared amongst government instrumentalities. But it is suggested that until the register becomes comprehensive, the objective of sustainability will not be achieved and it is essential that the process of registration be an expeditious one.

DEVELOPMENT OF REGISTERED HERITAGE PLACES

Once a place is entered on the register, the Scheme of the Act has a significant effect upon development proposals affecting that place. Registration does not necessarily prevent development, but it ensure the Council participates in the decision making process.

Owners of registered places commit an offence unless within 28 days of sale they notify the Council of the transaction.²⁹ Local Municipal Councils and other decision making bodies are required to refer to the Council development and planning proposals that may affect registered places and they must take into account the Council's advice when making decisions.³⁰

The Acts Amendment (Heritage Council) Act 1990 amends other legislation to give effect to the Act's provisions. For example, Section 8 of the Local Government Act requires a municipal council to refuse a demolition permit for a registered place and refer it to the Heritage Council. Similarly, development applications affecting registered places in "planning control areas" under the Metropolitan Region Town Planning Scheme Act must be referred to the Council,³¹ as are development or subdivision applications under the Town Planning and Development Act.³² This method of involving Heritage considerations with the development approval process contributes to the legislation being pro-active in encouraging conservation rather than merely reactive by punishing those who damage heritage places.

The register also fulfils an educative role by informing various decision makers and the public generally on the importance of built heritage. Registration within the Scheme of the Act ensures that the Council is aware of any decisions that may affect the cultural heritage of the State and that it may have some meaningful input at an early stage of development and town planning process. In this respect, sustainability is an ongoing process and is an essential part of the legislation.

CONSERVATION ORDERS AND COMPENSATION FOR DEVELOPERS

Part 6 of the Act gives the Minister for Heritage broad powers to make orders to ensure heritage places are protected. Section 59 enables special protection for a place whether or not it is registered. The Minister

may make a stop work order against the wishes of owners or developers where in his or her opinion there is a likelihood of imminent damage to a place and prohibition is urgently necessary. Such an order can relate to all aspects of activity either proposed or of a kind that may detrimentally affect the places' cultural heritage significance. If the developers authorise any activity prohibited by the stop work order or detrimentally affect the cultural heritage characteristics of the place, they can be fined up to \$10 000 and imprisoned for up to two years.³³ Developers may appeal to the Minister or the Town Planning Appeal Tribunal regarding the order under Section 60 and apply for compensation in the event of delays or losses under Section 75. However, compensation is consequential upon and to the extent of actual expenditure following the making of the stop work order. Section 75(3)(e) states:

"No account shall be taken of any prospective use of the land other than the restoration and conservation of a place of Cultural Heritage significance."

Therefore, the Act refuses to recognise compensation in those cases where the value of the property is decreased as a result of the order.

The parliamentary debates reveal vigorous and heated debate over this issue. It was suggested that as a result of this provision proponents of development will have their property rights diminished for the benefit of the wider community without recognition that they have suffered loss and consequently economic development in this State would suffer.³⁴ In a seminar paper delivered at the University of Western Australia Law School in 1990, the present Heritage Minister Mr McGinty suggested several convincing reasons why compensation was, in these circumstances, inappropriate:

"Under heritage legislation, no right has been lost or interfered with so as to warrant compensation. If heritage value is seen as a public right, there can be no assertion of private rights to deal with a heritage property inconsistent with its heritage. (And it is arguable) that a progressive regime would see those most able to pay for heritage preservation doing so. The owners of property in general are in the best financial position to pay for heritage protection."³⁵

In the transitional period, these compensation provisions may seem unduly harsh and even discourage development. Arguable progress towards culturally sustainable development should not result in an unequal burden of adjustment of particular groups in society.³⁶ But if discouraging some development is the result of the compensation provision, then the Act may well be achieving its stated purpose successfully. After all, the Act is raising conservation standards. It does not seek to encourage full development, but development which is culturally sustainable. A comprehensive system of registration will put developers on notice of this very fact.

CONCLUSION

Environmental disputes by their very nature are emotive and divisive conflicts. This is particularly the case when decision makers attempt to assess the conflicting values of preservation of heritage places and their development. It is suggested that the Heritage of Western Australia Act 1990 is a useful mechanism for environmental protection because it entrenches sustainability in its conceptual and administrative framework. But the extent to which the Act will actually achieve Culturally Sustainable Development requires an ideological and financial commitment by the government of the day to the integration of decision making processes at all levels. Moreover, it requires that the government encourage the maximum amount of Public Participation from all community interest groups and organisations in the registration process. Only then will our cultural heritage and economic prosperity be preserved for future generations.

FOOTNOTES

- 1 By using the term cultural "heritage" as opposed to cultural "environment", it is not intended to convey that the environment is synonymous with natural wilderness areas. The thrust of this essay is that the environment has natural and cultural aspects and Environmental Law must contain concepts and principles that apply to both uniformly.

- 2 IGAE formalised March 1992. Draft strategy released June 1992 for public Consultation with a view to agreement on a national strategy by December 1992.
- 3 Our Common Future p.9 Oxford University Press 1987.
- 4 Bates G, Environmental Law in Australia, 3rd edition p.6.
- 5 G. Lynch, "Integrating Conservation and Development" ALSA Conference Papers 1992.
- 6 It is expressed to be the development of any land including:
 - (a) any demolition, erection, construction, alteration of or addition to any building or structure on the land;
 - (b) the carrying out on the land of any excavation or other works; and
 - (c) in the case of a place to which a Conservation Order applies any act or thing that:
 - (i) is likely to change the character of the place or the external appearance of any building; or
 - (ii) would constitute an irreversible alteration of the fabric of any building.

This definition should also be read with the equally comprehensive definition of proposal which includes plans or policies.
- 7 S.3(1).
- 8 The West Australian, page 1, 14 August, 1992. Multiplex Chairman John Roberts confirmed that the development was in "*keeping with heritage values of the place*". Yet the development involves a 300 bay car park, pedestrian overpasses, six restaurants, shops, a theatre and office space.
- 9 This definition is substantially the same as the one provided in Article 1 of "The Burra Charter" and its accompanying guidelines produced by the Australian National Committee of the International Council on Monuments and sites (ICMOS) on 1988. It also corresponds with the definition of the "National Estate" in section 4 of the Australian Heritage Commission Act 1975, (Commonwealth) which is directed "*to components of the natural or cultural environment of Australia*".
- 10 S.3(1) of the Act.
- 11 Ibid. Buildings are also defined very broadly to include any structure erected or placed on land and any part or appendage to such structure. This appears to contemplate that the contents of a building may come within a definition.
- 12 (Davis BW Heritage Conservation in Australia: Some issues and Dilemmas (1988) AJPA47 at 49) Davis has suggested that the commission's functioning still reflects the political context of the governments which succeeded the reformist Whitlam administration. The Fraser Liberal-Country party coalition was ideologically opposed to conservation legislation which they believed inhibited development. When faced with the economic necessity during a recession of reducing government expenditure the Heritage Commission suffered. The commission was as a result severely under-resourced and has been reliant on various government and private organisations for support. The same fate may still await the Heritage Council in Western Australia if the liberal state opposition statements are implemented in government (see The West Australian, Monday 27 July, 1992, p.3).
- 13 These powers remain subject to the approval of the treasurer and the Minister, see 8(5), (6), (7) and s.14.
- 14 Section 8(2) and 8(6).
- 15 Section 8(2)(f).
- 16 Heritage Council information sheet June 1992.
- 17 Also see section 20.
- 18 Section 19(1)(f).
- 19 Section 19(4).
- 20 Sections 19(1)(c), (d), (e), and 19(3).
- 21 Section 19(1).
- 22 Section 49(1)(a)(b), 49(3).

- 23 Section 47(3).
- 24 Section 47(1).
- 25 Section 44.
- 26 Section 47(2).
- 27 Section 54. The registration and deregistration processes are substantially the same. See sections 9, 47 to 52.
- 28 Section 56.
- 29 Section 81.
- 30 Section 78.
- 31 See section 15.
- 32 Sections 13 and 16.
- 33 Section 61.
- 34 Western Australian Parliamentary Debates. Legislative Assembly 28 August 1990 Vol 11 pp. 4287-4288.
- 35 Unpublished paper, pp. 58-62.
- 36 See p.9 Draft National Strategy for Ecologically Sustainable Development.

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- 2 Boer, B. National Resources and the National Estate (1989) EPLJ 134.
- 3 Bates, G. Environmental Law in Australia, Third Edition, 1992.
- 4 Draft National Strategy for Ecologically Sustainable Development - A Discussion Paper June 1992. Australian Government Publishing Service.
- 5 Heritage Council of Western Australia Information Sheets, June 1992.
- 6 Intergovernmental Agreement on the Environment, March 1992.
- 7 Lynch, G. Integrating Conservation and Development: Australia's Resource Assessment Commission and the testing case of Coronation Hill, 1992, ALSA Conference Papers, at 66.
- 8 McGinty, The Hon Jim (MLA) Heritage Seminar Paper delivered September 1992, University of Western Australia Law School.
- 9 "Our Common Future" - Report of the World Commission on Environment and Development, 1987 Oxford University Press.
- 10 The West Australian Newspaper, Monday 27 July, 1992.