

AN INHERENTLY EXCLUSIONARY REGIME: HERITAGE LAW – THE SOUTH AUSTRALIAN EXPERIENCE

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I INTRODUCTION

Traditional European-based, Anglo-Australian conservation philosophy for the protection of built heritage¹ is exclusionary in nature. Heritage protection began as the pastime of upper socio-economic classes as a means of preserving particularly grand buildings and monuments for future posterity,² with the result that what was generally regarded as culturally significant excluded the values of many groups; the related heritage laws reinforced this position.³

More recently, the idea of what constitutes value and heritage significance has widened to become more inclusive, ranging ‘from the elite and grand to the vernacular and everyday; from the remote to the recent, and from the material to the intangible’.⁴ Modern philosophy of heritage has broadened to include places that assist in sustaining meaningful environments; that is, the character and social significance that communities associate with certain places.

While heritage philosophy may have shifted, heritage law continues, on the whole, to exclude certain communities, both ideologically and factually, by continuing to

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¹ Conservation of built heritage is generally a concept embraced by the West. Although Japan has a comprehensive built heritage regime, it has been suggested that ‘[i]t finds its proximate catalyzing influence in the occupation of Japan by Allied Forces from 1945 through 1952’: Geoffrey R Scott, ‘The Cultural Property Laws of Japan: Social, Political and Legal Influences’ (2003) 12 *Pacific Rim Law and Policy Journal* 315, 317.

² Peter Mandler, *The Fall and Rise of the Stately Home* (1997); David Lowenthal, *The Heritage Crusades and the Spoils of History* (1997); Cheryl Simpson, ‘Cultural Heritage on the Move: Significance and Meaning’ in Martin Chanock and Cheryl Simpson (eds), *Law and Cultural Heritage* (1996) 45, 47.

³ See, eg, *National Trust of South Australia Act 1955* (SA); *South Australian Heritage Act 1978* (SA), repealed by *Heritage Act* (now *Heritage Places Act*) 1993 (SA). See also, with regard to legislative legacy from the UK, *Ancient Monuments Protection Act 1882* (UK); *Ancient Monuments Consolidation and Amendment Act 1913* (UK).

⁴ Lowenthal, above n 2, 14.

operate with a mind-set firmly rooted in the traditional, exclusionary philosophy of heritage. The rhetoric of inclusion may be evident in modern heritage dialogue but a translation into any real substance in law remains to be seen.

This article examines the exclusionary nature of the traditional European-based, Anglo-Australian built heritage regime and looks at moves towards inclusion by various international instruments. The operation of current South Australian law and a comparison against certain provisions of Western Australian legislation are uncovered, along with a brief example of flawed decision making under current South Australian heritage legislation. The ultimate conclusion is that the fabric-focused nature of the South Australian regime precludes any substantive steps being made towards true inclusion.

II VALUING THE ELITE AND THE GRAND: A PHILOSOPHY OF DOMINATION

Traditional concepts of heritage focused on the physical aspects of the built environment; that is, the age, grandeur and integrity of the fabric of a place. The inception of the present-day heritage movement in Australia, as in the United Kingdom, was characterised by the steady growth of the National Trust. Davison writes:

Like the 'Mother Trust', the Australian [National Trust] found its initial *raison d'être* in public campaigns to save and restore that nation's 'stately homes' – the great colonial mansions like Como at Ripponlea in Melbourne, Adelaide's Marble Hill and Ayers House, Old Government House at Parramatta, The Hollies, near Launceston and Woodbridge at Guilford, near Perth.⁵

Such heritage is, on the whole, the heritage of the upper socio-economic classes who are, in turn, the controllers of the cultural capital. While these buildings are undoubtedly of great regional and/or national importance, they do not reflect the more common history and heritage of the general population.

The domination of a version of the past, supported by the traditional philosophy of heritage significance, also speaks to the strengthening of dominant, or devaluing of subordinate, identities. The Victorian elite, for example, justified their place in society by demonstrating a great affinity with the past, legitimising their way of life by 'reanimating a past that had been flattened and edited for exclusive purposes by virtuosi and aesthetes'.⁶ Doreen Massey argues for the fact that such domination takes place through interpreting heritage and asserting cultural identity:

When black-robed patriarchs organize ceremonies to celebrate a true national identity they are laying claim to the freezing of that identity at a particular moment and a particular form – a moment and a form where they had power which they thereby

⁵ Graham Davison and Chris McConville (eds), *A Heritage Handbook* (1991) 17-18.

⁶ Mandler, above n 2, 34.

justify themselves in retaking. All of which means, of course, that the identity of any place, including that place called home, is in one sense for ever open to contestation.⁷

This being the case, claims to place, identity and culture, are extremely valuable and highly politicised; an environment in which policies of exclusion and domination can ferment and ripen.

An interest in buildings of grand architectural nature, by definition, is an interest in the material aspects of a place (a particularly Western predilection).⁸ Such an interest is termed ‘aestheticism’.⁹ ‘Aestheticism’ is an indication of the ‘gentrification’¹⁰ of heritage by a dominant social group, which in turn alienates the remaining social groups. It is suggested that:

society is divided into dominant and subordinate groups; the ideas and values of the former are presented as the dominant ideology to the latter who are passive recipients accepting their subordination. Heritage generally occupies an important place in such an ideology; the cultural capital of the past is captured and used to legitimate a governing group which seizes power and maintains it through the use of a dominant ideology ... Subordinate groups may not passively accept the heritage they are given and thus accept their subordination. The most usual reaction of such groups is actually to ignore completely such dominant ideas. It is well known that museums, galleries, concert halls, theatres and even libraries and universities in most countries are overwhelmingly used by a small minority drawn from the educated controllers of the cultural capital.¹¹

Such aestheticism and gentrification is no doubt damaging to the feeling of inclusion experienced by minority social groups. Recognition of particularly grand buildings as significant alienates the ubiquitous ‘common man’ due to a lack of relevance to ‘his’ everyday life. The perception is that these buildings have no direct contribution to the identity or sense of self of the masses. Furthermore, the types of places that the ‘common man’ does hold to be significant are generally ‘overlooked or undervalued’.¹²

⁷ Doreen Massey, *Space, Place and Gender* (1994) 169.

⁸ The practices of the Shintō people in Japan, for example, are based on the protection of the spirituality of a place as opposed to the fabric. The periodic rebuilding of the Grand Shrine at Ise in Japan is a case in point. This religious ritual focuses on the intangible values that underlie the area. The spirituality of the site is enhanced by the periodic rebuilding; the beauty is in the cycle of life and the inevitable decay that will eventually befall the wooden structure. See generally Yasutada Watanabe, *Shintō Art: Ise and Izumo Shrines* (1974). This also applies to the heritage of Indigenous Australians who place value and significance in spirituality over fabric.

⁹ A term in general usage, but in this context borrowed from Todd Schneider, ‘From Monuments to Urban Renewal: How Different Philosophies of Historic Preservation Impact the Poor’ (2001) 8 *Georgetown Journal on Poverty Law and Policy* 257.

¹⁰ *Ibid* 264-5.

¹¹ Gregory Ashworth and Peter Howard, *European Heritage Planning and Management* (1999) 63.

¹² Department for Culture, Media and Sport, Architecture and Historic Environment Division, *The Historic Environment: a Force For Our Future* (2001) 3.1.

It has been said that ‘the exclusion of buildings found in low-income neighbourhoods from the Aestheticists’ regime has implied that low-income communities lack value, aesthetically or otherwise.’¹³ By failing to recognise the importance of vernacular, everyday heritage to the communities to whom it is significant, there is also a failing to afford associated protection. A lack of protection can result in the loss of such heritage; which loss can ultimately result in the fragmentation of these social communities.¹⁴ When communities have no cultural heritage with which they can identify, there is a lack of a sense of wellbeing¹⁵ through exclusion, and a prevailing feeling of disengagement and displacement from mainstream society; the result – no sense of meaning, significance or place. Indeed, Scott Bernstein, president of the Centre for Neighbourhood Technology, suggests that ‘[h]ealthy communities do for people what ecosystems do for the rest of nature: provide a measure of stability and positive synergy in the otherwise chaotic lives of individuals’.¹⁶

Michael Leunig, cartoonist and social commentator, recently remarked that he perceives a link between people’s disengagement from their environment and the high level of young people being prescribed anti-depressants in South Australia and indeed in Australia as a whole.¹⁷ Furthermore, Howard Frumkin comments on the link between people’s health and their environment:

¹³ Schneider, above n 9, 264-5.

¹⁴ ‘[T]he physical attachment of people to the neighbourhood [is] intertwined with kinship and neighbourhood and institutional ties, and destruction of the neighbourhood also fragmented the social community’: Tamara K Hareven and Randolph Langenbach, ‘Living Places, Work Places and Historic Identity’ in Marcus Binney and David Lowenthal (eds), *Our Past Before Us: How Do We Save It?* (1981) 17.

¹⁵ ‘Wellbeing: research is demonstrating that, although society as a whole is more materially prosperous than ever before, many of its members feel excluded, powerless and unhappy. What is good for the economy is not necessarily good for society.’: Jon Hawkes, *The Fourth Pillar of Sustainability: Culture’s Essential Role in Public Planning* (2001) 9. See also Kathleen Lloyd and Christopher Auld, ‘Public Space and Quality of Life in the Urban Environment’ (2003) 21 *Urban Policy and Research* 339.

¹⁶ Scott Bernstein, *Using the Hidden Assets of America’s Communities and Regions to Ensure Sustainable Communities*, Centre for Neighbourhood Technology, <<http://www.cnt.org/hidden-assets/pt3.html>> 7 February 2006. The Centre for Neighbourhood Technology (CNT) is an organisation that works primarily in the Chicago area. The CNT has recently begun projects in San Francisco, Los Angeles, Pittsburgh and Seattle, their mission statement being ‘to invent and implement new tools and methods that create liveable urban communities for everyone.’ CNT, *What is CNT?* (2006), <<http://www.cnt.org/about>> 30 January 2006. Some of CNT’s major accomplishments in 2005 were the launching of ‘Civic Footprints’, which was designed to ‘help residents in the Chicago area locate themselves in the often complex political jigsaw known as Cook County’, and assisting two local municipalities of Chicago ‘in developing smart growth revitalization strategies’: CNT, *Help CNT Create a Sustainable Future* (2005), <<http://www.cnt.org/support>> 30 January 2006.

¹⁷ Michael Leunig, ‘Title’ (speech delivered at Department of Environment and Heritage ‘Stirring the Possum’ Community Forum, Adelaide, 28 April 2004).

Urban form has much to do with health. Attention to the health problems of the center city has focused largely on social and organisational factors rather than features of the built environment.¹⁸

Frumkin also observes that:

Some places are romantic, and some places are depressing. There are places that are confusing, places that are peaceful, places that are frightening, and places that are safe. We like some places better than others. Place matters ... The qualities of a place – and its potential impact on health – represent more than its physical features. Place is also a social construct ... If places have such varied and far-reaching effects on people, we would expect some places to surpass others in promoting health and well-being.¹⁹

A sense of place and, in turn, inclusion comes from a feeling of familiarity and continuity. For the benefits of protecting the built environment to be seen in terms of social inclusion and the creation of meaningful environments,²⁰ there must be a drive towards the creation of sustainable communities; not only sustainable environments.

The consequence of all this is that, to be inclusive, heritage policy must recognise and designate with more than architecture, fabric and age in mind. Heritage can no longer be seen as the domain of the upper socio-economic classes who protect with a wistful eye on the past. There has been a shift; a recognition that heritage is a means to an end and not simply an end in itself. There is now an appreciation that in order to establish a sense of inclusion for communities and minority groups, to provide society with a sense of wellbeing and identity, vernacular and everyday heritage must also be protected. This is no mean feat: the values that create associations and meaning in a place are generally intangible in nature; adding an additional layer of complexity to a regime which has been solely based on the protection of the fabric of places.

III VALUING THE VERNACULAR AND EVERYDAY: TOWARDS INCLUSION

This shift is somewhat evident in current South Australian legislation. It is not only the grand and elite that have been recognised under the current South Australian regime.²¹ Miners' cottages, for example, are included on the South Australian

¹⁸ Howard Frumkin, 'Healthy Places: Exploring the Evidence' (2003) 93 *American Journal of Public Health* 1451, 1454.

¹⁹ Ibid 1451.

²⁰ A meaningful environment is taken to mean an environment which encourages sustainable communities, a strong sense of identity and self, community engagement, social cohesion and inclusion and helps stave off cultural and psychological poverty.

²¹ *Heritage Places Act* 1993 (SA) s 16; *Development Act* 1993 (SA) s 23(4). The *Development Act* is currently under review in the form of the Development (Sustainable Development) Amendment Bill 2005. The Bill will not be examined in this article as the provisions do not address the concepts of value and significance of local heritage; in this respect the *Development Act* remains unchanged.

Heritage Register²² alongside more grandiose structures such as Ayers House.²³ As the concept of what is of heritage value shifts, so the vernacular and everyday heritage has been recognised as possessing value for communities and cultural diversity for the nation as a whole.

New appraisals of significance have been drawn into the heritage debate. The fact that there is now an ICOMOS Charter that deals explicitly with the built vernacular heritage speaks to this fact.²⁴ The *Preamble* states that

[t]he built vernacular heritage is important; it is the fundamental expression of the culture of a community, of its relationship with its territory and, at the same time, the expression of the world's cultural diversity.²⁵

Additionally, UNESCO made a significant shift towards recognition of intangible value that go towards sense of place in 1992 when changes were made to the *World Heritage Convention Guidelines* to allow for the inclusion of 'cultural landscapes' on the World Heritage List.²⁶ The changes that were made were to cultural criterion (iv) to include living traditions, and to cultural criterion (v) to include land use. There is a suggestion, however, that there has been resistance to the inclusion of intangible values in the criteria.²⁷

The *Australian ICOMOS Charter for Places of Cultural Significance* ('Burra Charter') has also been reworked to include reference to intangible values associated with places. While these steps are commendable and undoubtedly a step in the direction of social inclusion through heritage designation, the 'Burra Charter' in particular has been criticised for being 'reductionist' in its approach due to its ordering of heritage into categories such as historical or architectural, as opposed to 'examining the complex issue of what constitutes cultural heritage'.²⁸ Having taken the step of incorporating intangible considerations, the 'Burra Charter' falls short in failing to have a full understanding of what cultural heritage actually encompasses.

²² See Australian Heritage Places Inventory, Record Identifier 7379 for 8-14, 16 and 18 Truro Street, Burra, <<http://www.heritage.gov.au/ahpi/index.html>> 20 February 2006.

²³ Australian Heritage Places Inventory, Record Identifier 6349 for 228 North Terrace, Adelaide, South Australia, <<http://www.heritage.gov.au/ahpi/index.html>> 20 February 2006.

²⁴ ICOMOS, *Charter on Built Vernacular Heritage*, Mexico, October 1999. See also UNESCO, *Convention for the Safeguarding of the Intangible Heritage*, Paris, 17 October 2003. The Intangible Heritage Convention was adopted in October 2003 by the UNESCO General Conference and, although Australia is not a party, the Convention was tabled in June 2004 as under negotiation, consideration or review by the Australian Government. See Australasian Legal Information Institute, <<http://www.austlii.org/au/other/dfat/mta/mta2004.html>> 7 February 2005).

²⁵ ICOMOS, above n 24, *Preamble*.

²⁶ *Convention Concerning the Protection of the World Cultural and Natural Heritage*, adopted 16 November 1972, UNTS 1037, 151 (entered into force 17 December 1975).

²⁷ Harriet Deacon et al, *The Subtle Power of Intangible Heritage for the Social Cohesion and Integration Research Programme* (Human Sciences Research Council) (2004) 15.

²⁸ Dawson Munjeri, 'Tangible and Intangible Heritage: From Difference to Convergence' (2004) 56(1/2) *Museum International* 12, 13.

In fact, this is a criticism that could be made of all regimes incorporating criteria into the assessment process, from the *World Heritage Convention* 1972 to the current South Australian heritage legislation.²⁹ The simple reason for this is that these regimes are based on the traditional fabric-focused heritage philosophy. Munjeri cites an excellent example of the World Heritage Committee completely missing the point with regard to recognition (or lack thereof) of intangible value in the listing of a potential site, which is worthy of being quoted in full:

Inscribed in 2000 on the UNESCO World Heritage List is a house, the Rietveld Schröderhuis in Utrecht in the Netherlands. Designed by the famous architect, Gerrit Thomas Rietveld and built in 1924, the physical fabric is in fact a manifesto of the De Stijl movement. This was an influential group of architects who through their periodical, *De Stijl*, became an influential voice of the ideals of modern art and architecture. Through abstraction, precision and geometry and studying the laws of nature, the movement sought to achieve artistic purity and austerity. The Schroeder House was the first declaration of these ideas on a large scale, thus becoming the architectural manifestation of the movement. The House is therefore an icon of the modern movement in architecture; a masterpiece not in terms of the tangible expression but as a philosophy. Yet when the World Heritage Committee inscribed the site on the list it did not accept the inclusion of cultural criterion (vi) of the *Operational Guidelines* which relates to cultural heritage ‘directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance’.³⁰

It is this pervasive fabric-focused mind-set that continues to preclude a true recognition of the intangible values that are so important for social inclusion. The example of the Rietveld Schröderhuis is an excellent illustration of the rhetoric of intangible significance being negated by a lack of understanding at a supranational level that ultimately finds its self embodied in domestic regimes.

IV SUBSTANCE OR RHETORIC: THE INTEGRATION OF AN INCLUSIVE CONCEPT OF HERITAGE INTO SOUTH AUSTRALIA

Superficially, current South Australian heritage legislation incorporates an inclusive concept of heritage. These provisions must be critically analysed, however, to interpret whether or not this incorporation has any substance or is mere rhetoric.

A The Heritage Places Act 1993 (SA) and the Development Act 1993 (SA)

Research of the Parliamentary Debates leading up to the passing of the Heritage Bill on 6 May 1993 gives an insight into the underlying heritage theory employed at this time. The second reading of the Bill in the House of Assembly by the Honourable

²⁹ *Heritage Places Act* 1993 (SA); *Development Act* 1993 (SA). An example is the inclusion of a representative sample: see the Miners’ Cottages, above n 22.

³⁰ Munjeri, above n 28, 13-14.

MK Mayes³¹ demonstrates a dissatisfaction with the existing legislation of the time³² and a need for a 'more flexible and responsive legislative package'.³³

Some of the main points raised in the discussion of this Bill are of particular significance to this article, in that they deal both explicitly and implicitly with the modern heritage philosophy and issues of social inclusion. The main features of these arguments are as follows:

1. The previous legislation did not properly mirror the interests of the community in preserving local heritage; the Act would seek to remedy this;³⁴
2. A breadth of expertise should found the State Heritage Authority,³⁵ although in which subjects the experts should be expert was not revealed; and
3. If there is general agreement that 'the property is not a heritage one', then there should be no bar to development.³⁶

These arguments will be examined in turn.

1 *Community Interests*

The *South Australian Heritage Act 1978* (SA) was criticised by the Hon M K Mayes in the Parliamentary debates concerning South Australia's current heritage legislation. Mayes stated that

the existing heritage measures do not adequately reflect community interest in conserving local heritage ... the processes of heritage administration are too centralised and closed ... In response to these criticisms, the resulting legislative package offers something for everyone. The community at large is given a greater say in conserving the historic environment.³⁷

The suggestion here is that the new Act was to open up the regime of heritage protection to the masses; to increase public participation and hence factual inclusion. An examination of the language of the Act itself, however, is enlightening.

³¹ South Australia, *Parliamentary Debates*, House of Assembly, 31 March 1993, 2787 (the Hon M K Mayes, Minister of Environment and Land Management).

³² *South Australian Heritage Act 1978* (SA) (now *Heritage Places Act*).

³³ South Australia, *Parliamentary Debates*, above n 31.

³⁴ *Ibid.*

³⁵ South Australia, *Parliamentary Debates*, House of Assembly, 29 April 1993, 3270 (the Hon D C Wotton (Heysen)). The expertise tends to be focused on architects and historians and therefore the majority of values recognised are historical and architectural.

³⁶ South Australia, *Parliamentary Debates*, House of Assembly, 6 May 1993, 2416 (the Hon Anne Levy, Minister for the Arts and Cultural Heritage).

³⁷ South Australia, *Parliamentary Debates*, above n 31.

Sections 15, 17 and 18 of the *Heritage Places Act* do provide for public participation. S 15 provides that the Register³⁸ must be made available for public inspection at the office of the South Australian Heritage council (formerly the State Heritage Authority) during normal office hours, and s 17 that any person can make an application to the Council for the Council to *consider* whether a place should be entered on the Register.³⁹ Lastly, s 18 of the Act states:

- (1) [I]f the Council gives notice that it has made a provisional entry in the Register, any person may, within 3 months after the notice is given, make written representations to the Council on whether the entry should be confirmed.
- (2) If a person who makes written representations under this section seeks to appear personally before the Council to make oral representations, the Council must, unless the submission is frivolous, allow that person a reasonable opportunity to do so.
- (3) The Council must consider all written and oral representations made under this section.

The rhetoric of inclusion is certainly evident. So what is missing? A considerable amount, this article contends.

To restate Mayes: the *Heritage Places Act* gives the community ‘a greater say in conserving the historic environment’.⁴⁰ It has been discussed, above, that communities and the ‘common man’ have been described as feeling isolated, marginalised and dislocated from designated items and places of heritage because they perceive that these lack relevance to their lives. This being the case, why does the legislation currently in force in South Australia with regard to heritage, appear to provide mechanisms for public consultation but then fail to employ a community-led definition of heritage value and significance? In addition, given the fact that heritage can mean different things to different people and that the definition of significance has opened up a great deal in recent times, it makes sense to have communities define the heritage that is important to them. How can so-called experts possibly hope to define what is of heritage value to a community, if they are not themselves a member of that group?

Instead of facilitating engagement between communities and their heritage, as implied by Mayes, the *Heritage Places Act* appears to provide for public consultation with the purpose of providing a mechanism to ‘appease’ with regard to decisions made, or ‘justify’ in relation to policies implemented.⁴¹ Furthermore, as Jon Hawkes observes with regard to the impact of culture, and following on from

³⁸ South Australian Heritage Register provided for in *Heritage Places Act* 1993 (SA) s 13.

³⁹ ss 15(1) and 17 (1).

⁴⁰ South Australia, *Parliamentary Debates*, above n 31.

⁴¹ Michael Turnpenny, ‘Cultural Heritage, an Ill-defined Concept? A Call for Joined-up Policy’ (2004) 10 *International Journal of Heritage Studies* 295, 303.

this the built cultural heritage, the sustainability and wellbeing of communities resulting from “top-down” efforts ... will not achieve their aims ... unless these issues are creatively addressed within communities’.⁴²

So, to the function of the *Development Act* 1993 (SA) in incorporating an inclusive model of heritage designation. The debates of the Legislative Council and House of Assembly in the drafting of this legislation, again, shed light on the heritage theories underlying the provisions. A Conservation Council submission was discussed in the State Parliament with regard to the practicality and implementation of the then Development Bill. The Honourable Bernice Pfitzner outlined some of the principal points.⁴³ The Conservation Council maintained that the legislation should ensure public ownership of decisions and create an advanced community consultation process regarding developments.⁴⁴ The resultant provision, s 38, provides extensive details as to public notice and consultation. Such consultation is limited, however, to particular development applications and goes no way toward specifying that which should and should not be regarded as local heritage, nor does it enquire into what the community regards as significant in terms of heritage. It is the ‘relevant authority’⁴⁵ who decides what is, and what is not, significant to a community. To reiterate: the *UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage* 2003 provides in Article 2 that intangible heritage is considered to be that which a community or group recognises as their heritage, not that which the ‘experts’ decide to be significant.

2 South Australian Heritage Council Expertise

The composition of the State Heritage Authority (now the South Australian Heritage Council) was discussed in the Parliamentary Debates of the Heritage Bill. It was suggested by the Honourable D C Wotton that ‘provisions relating to membership [of the State Heritage Authority] should ensure that a range of areas and expertise are represented’.⁴⁶ The reason behind this, no doubt, being balance within that body as to its valuation of heritage significance. This translated into s 5 of the present-day *Heritage Places Act* 1993 (SA).

S 5 provides that the Council shall consist of:

- (a) not less than 6 and not more than 8 persons who, in the opinion of the Governor, have knowledge of or experience in history, archaeology, architecture, the natural sciences, heritage conservation, public administration, urban and regional planning or property development (or any combination of 2 or more of these fields), or some other relevant field; and

⁴² Hawkes, above n 15.

⁴³ South Australia, *Parliamentary Debates*, Legislative Council, 22 April 1993, 1991-2 (The Hon Bernice Pfitzner).

⁴⁴ *Ibid.*

⁴⁵ *Development Act* 1993 (SA) s 34.

⁴⁶ South Australian *Parliamentary Debates*, above n 35.

- (b) 1 person with knowledge of or experience in heritage conservation chosen from a panel of 3 such persons submitted to the Minister by the Local Government Association of South Australia.

While this composition reflects the traditional, and exclusionary, philosophy of heritage significance - history, archaeology, architecture - this provision does not confer membership on an ‘expert’ in social value.⁴⁷ The Council is therefore lacking any input concerning a value essential to the creation of meaningful environments and social inclusion. In order to determine the significance of the historic built environment to a community or group, the community or group involved must be consulted. Under the current legislation, there is no provision for this to happen.

3 ‘The Property is not a Heritage One’⁴⁸ – a Decision for the Experts?

The Honourable Anne Levy suggested, in the House of Assembly Parliamentary Debates on the then Heritage Bill, that, if there is general agreement that ‘the property is not a heritage one’, then there should be no bar to development. This raises the question, however: on whose agreement does such a decision rest?

Section 17 of the *Heritage Places Act* provides for the South Australian Heritage Council to consider whether a place should be entered on the South Australian Heritage Register. More importantly, s 17(2) states that:

If the Council is of the opinion –

- (a) that a place is of heritage significance; or
- (b) that a place should be protected while an assessment of its heritage significance is carried out,

it may provisionally enter the place in the Register.

If there is a presumption in favour of development where there are no obvious heritage values attached to a property, it follows that protection against demolition and inappropriate development rests very much upon the value ascribed to a structure or building, and what is considered to be an *obvious* heritage value. As it is the South Australian Heritage Council who judge the significance of built environments in South Australia, if they do not adequately consult with the community in which the structure exists the social value of the heritage could well be missed. Hareven and Langenbach expand on this issue making it clear that the community must be involved in decisions concerning ‘their’ heritage:

Preservation is in a sense a community act. It is as important as a process as in its results, contributing to the mutual education of people who see beauty and value in terms of architecture or of a building’s place in the history of engineering, technology, or town planning, and those who know simply that the buildings and places are meaningful in terms of their own lives. Successful conservation can rarely

⁴⁷ The author acknowledges that this is challenging in itself, as social value changes from group/community to group/community.

⁴⁸ South Australia, *Parliamentary Debates*, above n 36.

result from the actions of either group alone. It is most effective when it reflects a coming together of people from both backgrounds. As conservation effort becomes a real force in a community, the diversity of its roots within the community and the multiplicity of its goals for different people prove to be its most significant aspects.⁴⁹

While the inclusive, modern theory of heritage appears to have been integrated into legislation in South Australia, a closer look reveals that the regime is still in fact exclusionary in nature.

V DECISION MAKING IN HERITAGE IN SOUTH AUSTRALIA

In order to determine whether the modern, inclusive philosophy of heritage has been integrated into the South Australian heritage regime, it is not enough to look only to the legislation; this is only one piece of the puzzle. Another factor that must be taken into account is the way in which the regime is administered; the implementation of legislation through decision making.

While legislators are the ‘brokers between the community and the courts ... the *only* ones who can translate and, when necessary, discipline raw community demands to ensure their compatibility with the process values safeguarded by the courts’,⁵⁰ the overall outcome will depend heavily upon how well the legislation is applied. The reason for this is because courts are not often involved in disputes relating to the significance and value of heritage. Costonis suggests that

[b]y the time an aesthetics measure comes before them [the courts], it is written in stone and can only be voted up or down. Also wide of the mark is the assumption that dubious measures will actually come before the courts. Mounting a lawsuit is so costly, time-consuming, and uncertain a venture that even the most questionable laws often go uncontested.⁵¹

This is one reason why there is not a great deal of case law on this matter. Moreover, disputes regarding value and significance are not the nature of heritage litigation. Case law relating to heritage matters generally concerns a challenge by an owner of a local council’s refusal to grant development consent.⁵²

It can be argued that administrators are only as good as the legislation by which they are bound; where legislation lacks sufficient strength to guide the decision maker, the result can be a hotchpotch of inconsistent ‘policy’ decisions. Costonis agrees:

⁴⁹ Hareven and Langenbach, above n 14.

⁵⁰ John J Costonis, *Icons and Aliens: Law, Aesthetics and Environmental Change* (1989) 43.

⁵¹ *Ibid.*

⁵² See *Courtney Hill Pty Ltd v SA Planning Commission* (1990) 59 SASR 259; *Jones v City of Mitcham* [1998] SAERDC 516 (30 October 1998); *I & N A Davies Pty Ltd v City of Unley* [2002] SAERDC 93 (16 October 2002); *Hutchison 3G Australia Pty Ltd v Adelaide City Council* [2002] SAERDC 71 (7 August 2002).

How well administrators perform their job depends very much upon how well lawmakers and judges perform theirs. When lawmakers utter standardless mandates, administrators often make aesthetic policy decisions themselves ... When judges approve such delegations of legislative power, that policy becomes law.⁵³

It follows that, in order to gauge a complete picture of whether or not modern, inclusive, heritage values have been incorporated into the regime, it is necessary to look to selected examples of administrative decision making under the South Australian heritage regime.⁵⁴

A Former Sutherland Lodge Salvation Army Women's Hostel, 343-345 Angas Street, Adelaide, South Australia (Sutherland Lodge)

The former Sutherland Lodge was the subject of a challenge to the refusal of development planning consent in the case of *Hutchison 3G Australia Pty Ltd v Adelaide City Council*.⁵⁵ Commissioner Hodgson reversed the decision of Adelaide City Council to refuse the company's application to erect a telecommunications base station on the roof of the State Heritage listed 343-345 Angas Street, Adelaide. The application was rejected for being at

variance with the Development Plan particularly relating to impacts on the values of the State Heritage Place and to the visual impacts of the structure.⁵⁶

The question is: to what extent the values of the State Heritage Place were compromised by the erection of the telecommunications base station? The decision of Adelaide City Council appears to have been made without reference to the relevant values for which the building was listed. The judgment in this case states that Mr Harry, architect and expert in heritage conservation matters, considered the listing of the building to be

principally for its historical significance as a representation of the charitable and social activities of the Christian organisation for which it was constructed in 1922, and of the changing societal structure and attitudes of the South Australian Community after World War I.⁵⁷

Historically, the need

for such a hostel arose out of women's growing interest in an independent working life outside the domestic sphere. This produced a marked demographic shift in the ratio of women to men in Adelaide during the 1920s as young women moved into clerical, professional and other jobs in the city.

⁵³ Costonis, above n 50, 44.

⁵⁴ Space constraints have restricted this examination to two examples of flawed decision making. For further examples of flawed heritage decisions in South Australia and jurisdictional comparisons of heritage legislation, see Petrie, above n *.

⁵⁵ [2002] SAERDC 71 (7 August 2002).

⁵⁶ [2002] SAERDC 71, [1]: application refused by Adelaide City Council on 3 December 2001.

⁵⁷ [2002] SAERDC 71, [16].

Sutherland Lodge was built to cater for some of the basic needs created by this shift. It was designed as a safe home for young working women and students, most of whom came from the country, and has continued to provide this service for more than sixty years.⁵⁸

The heritage value of this place is considered to be historic and it is fitting that the Lodge is now used as a backpacker's hostel; the spirit of providing a safe residence for young people, in this case travellers, remains. Why, then, would Adelaide City Council object to the erection of a telecommunications base given that such development would seem to cause no detriment to the values for which the building was listed? Mr Harry agrees and is quoted as commenting that:

The heritage values of a building commonly reside in its representation of a particular architectural style, detailing and use of materials, and its immediate setting, and/or its association with key historic persons, events or activities, and may be enhanced by having a wide context ... However, a place's association with historic persons, events or activities is often not visible in, or comprehensible from its architecture or built form and in the case of the former Sutherland Lodge Salvation Army Women's Hostel, there is no apparent representation of the place's stated historical significance in the external architecture detailing or physical form of the building. The proposed development cannot therefore have any meaningful impact upon the place's historic values or associations. Further, the locality has no historic built form character or other traditional buildings which the design, form, scale and siting of the telecommunications facility might feasibly respect.⁵⁹

The Environment, Resources and Development Court of South Australia concurred. It was held that, as the heritage significance of the place was historical in nature rather than architectural, there was no impairment of these values in erecting the telecommunications base station. Commissioner Hodgson concluded his judgment with the comment that:

Central to that assessment is the basis upon which the building was listed. Clearly, if the building's significance lies primarily in its architecture, the addition of a structure, such as that proposed, which has no place in the architectural vocabulary of the building would have a greater potential impact on the latter's heritage significance than it would were that significance to reside primarily in its association with historical events or trends.

The only evidence put before me as to the basis for listing indicates that, while the staff of the then State Heritage Branch recommended that the building be listed on the basis of both its history and its architecture, its provisional listing was based solely on the former criterion. While Mr Leydon raised the possibility of the State Heritage Committee having reinstated the second, architectural criterion when it confirmed the listing of the building subsequent to the period allowed for public

⁵⁸ Susan Marsden, Paul Stuart and Patricia Sumerling, *Heritage of the City of Adelaide* (1990, 2nd imprint, 1996) 204.

⁵⁹ See *Hutchison 3G*, above n 52, [17].

submissions on its provisional listing, he produced no evidence to suggest that had occurred, and in the absence of such evidence, I am satisfied that the primary significance attaching to East Park Lodge lies in its historical significance ...⁶⁰

This litigation demonstrates that the heritage decision makers in this case had a bias towards the traditional, exclusionary philosophy of heritage protection: the protection of the fabric of the place as an end in itself. The decision made with regard to development consent, in this situation, was made based on the wrong consideration – the integrity of the original form, which is of course an architectural consideration. Underlying these types of decisions is a basic misunderstanding of the purpose of heritage protection – the inclusive purpose of the creation of meaningful environments. Until the mind-set of heritage decision makers is turned away from the traditional, exclusionary, fabric-focused philosophy of heritage value and significance, and focused towards the value found in the inclusive philosophy of heritage significance, such decisions will continue to be made and significant, inclusive values of heritage overlooked.

B *Fernilee Lodge, Burnside, South Australia*

This is a further example of questionable decision making by Burnside Council, South Australia - this time not based on litigation. This example concerns a place that was considered for listing as a State or Local Heritage Place⁶¹ and arguably holds some degree of social value, but that was never listed.⁶² Unfortunately, the decision made by the administration of the heritage regime found there to be no heritage value in this place and as a result the building was demolished. The building in question was Fernilee Lodge.

Fernilee Lodge was a property once situated in the Burnside Council area of Adelaide at the site now known as 6 Gartrell Street and known formerly as 569 Greenhill Road. Built in the late nineteenth century⁶³ with plaster work provided by Adelaide plasterers and modellers T W Ingham & Sons,⁶⁴ the Lodge was demolished in early 2003 following a rejection of State Heritage listing by Heritage SA. The Lodge had been used for a number of years as a venue for wedding receptions, which makes this example particularly useful in a discussion of social

⁶⁰ See *Hutchison 3G*, above n 52, [42]-[43].

⁶¹ City of Burnside, Minutes of Council Meeting (18 February 2003) 5-6.

⁶² With regard to the failure of local councils to take social value into account in heritage decision making, see Lesley-Anne Petrie, 'The Implementation of Heritage Legislation in South Australia: a Comment on *I & N A Davies Pty Ltd v City of Unley*' (2005) 8 *Flinders Journal of Law Reform* 235.

⁶³ ABC Television, 'Losing Our Heritage to Developer's Profits', *Stateline South Australia*, 7 November 2003, <<http://www.abc.net.au/stateline/sa/content/2003/s984874.htm>> 16 February 2006.

⁶⁴ T W Ingham & Sons, *The Story of T W Ingham & Sons*, accessed 16 February 2006 but no longer available. See, however, <<http://www.twingham.com.au/Aboutus.phtml>> 10 September 2006.

value; a place with many positive associations for the communities for whom this place was socially significant.

It was said that the Lodge did not have 'sufficient heritage value to meet any of the criteria required for entry'.⁶⁵ In an interview, Brian Samuels, Principal Heritage Officer of Heritage SA, stated that, as Fernilee Lodge was not considered to be a State matter, Heritage SA did not get involved; it was felt that s 16 of the *Heritage Act* 1993 (SA) did not apply.⁶⁶ The result was that the fate of the building was left in the hands of the 'relevant authority' – Burnside Council.⁶⁷ The upshot: partial demolition of the building for the purpose of subdivision.⁶⁸ The redevelopment of the site stalled on a number of occasions due to the Development Application of the developer being contrary to a number provisions of the City of Burnside Development Plan; not least Council Wide Objective 1 '[s]atisfaction of the social, cultural, economic, environmental and health needs of the community'. The site currently remains undeveloped: the developers were forced into liquidation in July 2004 following a number of charges being lodged against them by the Australian Securities and Investments Commission.⁶⁹

Whatever the reason for not listing, and while the Lodge might have been too drastically altered to be considered architecturally authentic, or never associated with any important historical figure, the fact remains that, in the evaluation of the significance of this place, no consideration was given to its social value. There is also an issue concerning the fact that local heritage listing is voluntary - that is, under s 57(2) of the *Development Act* 1993 (SA) '[a] council may enter into an agreement relating to the development, management, preservation or conservation of land within the area of the council with the owner of the land'. Further, under s 57(2) of the same Act all persons with a legal interest in the land must consent to the heritage agreement being put in place. In effect, this means that, even if the property is identified as being of heritage significance, a non-consenting owner could put a stop to any protection being provided.

The uproar that ensued upon the demolition of the building⁷⁰ has proven that Fernilee Lodge did indeed hold a degree of social value for a number of Adelaideans - mainly, but not only, because the Lodge was a popular location for wedding ceremonies and receptions. What of the application of the *Development Act*? S 23(4)(a) of the Act allows for listing of places as locally significant if they

⁶⁵ Louise Treccasi, 'Heritage all the Rage', *The Advertiser* (Adelaide), 26 August 2003.

⁶⁶ Interview with Brian Samuels, Principal Heritage Officer of Heritage SA, Department of Environment and Heritage (Keswick, 11 November 2004). See City of Burnside, Minutes of Development Assessment Panel Meeting (1 April 2003) 106-107.

⁶⁷ *Development Act* 1993 (SA) s 34(1)(a).

⁶⁸ City of Burnside, Minutes of Development Assessment Panel (24 February 2004) 12. Development Application 180/668/03/DL Proposal: Land division creating fifteen allotments from one existing.

⁶⁹ InterNet Bankruptcy Library, *Troubled Company Reporter Asia Pacific* (2005), <http://bankrupt.com/TCRAP_Public/050124.mbx> 16 February 2006.

⁷⁰ ABC Television, above n 63.

display social themes; s 23(4)(b) provides for listing where there is a representation of ‘customs or ways of life that are characteristic to the local area’; and s 23(4)(c) for a place that has ‘played an important part in the lives of local residents’. This criterion adheres to the inclusive theory of heritage protection and might arguable have been employed in this case to establish heritage value on a local scale.

The public outrage that ensued as a result of the demolition of Fernilee Lodge indicates that it held certain associations for many people, indicating that the criteria of the *Development Act* might have been applied. So, why was it not listed? The decision of Burnside Council not to list this property as a Local Heritage Place is not unreasonable *per se*; indeed the degree of social value embodied in this place may not have warranted an identification of its significance on the Development Plan and thus associated protection; we will never know because no-one ever asked. The fact that such an evaluation was never undertaken, however, identifies a basic misunderstanding of the criteria for listing, which includes provision for listing on the basis of social value, contained in the Act.

This example further demonstrates the lack of appreciation of the modern, inclusive values of current heritage theory. The place in question held no significant traditional heritage value and hence Fernilee Lodge was written off as worthless. There is a clear indication here that, although the rhetoric of an inclusive theory of heritage appears to have been incorporated into South Australian heritage legislation, an appreciation of the importance of these values was certainly not evident when the decision makers decided the fate of Fernilee Lodge.

In this case, there was no effective mechanism for successful community consultation; no way of establishing the fact that the area was significant to certain groups. As long as the bodies who administer the South Australian heritage regime⁷¹ are ignorant of the value of these places to the associated groups and communities, listing for reasons that are purely social (and, following from this, inclusive) will never be a reality. There are barriers, however, to effective community consultation. Without canvassing the opinions of those people who felt an affinity with the property on every conceivable level, Heritage SA and Burnside Council could never have concluded that the otherwise non-descript building held such social significance for such a proportion of the population. This raises issues regarding the indeterminacy of groups and communities and the implications for effective community consultation.

C Matters Precluding Effective Protection under the Current Regime

1 Indeterminacy of Class and Effective Community Consultation

It is accepted that heritage can, and does, exist on differing spatial scales. From local heritage to world heritage, associations and meanings are cultivated and

⁷¹ South Australian Heritage Council or relevant local councils.

heritage acquires significance. Moreover, identities are often layered. The *Western Australian Sustainability Strategy* picks up on this point, stating that:

Community can refer to both geographical communities and communities of common interest. Moreover people can be simultaneously involved in a number of different communities and move between them over a short period of time. To actively enhance communities also requires an understanding of what these people perceive as their community.⁷²

If there are so many possible combinations of identities, how can we be sure that the value of each group or community⁷³ places on the built environment is taken into account? The International Network on Cultural Policy suggests that

[w]e should include the heritage associated with common unities of people who do not necessarily live in close proximity, but share an interest or characteristic, such as ‘communities’ of gay men or women.⁷⁴

Carolyn Shelbourn illustrates this point further in a discussion of the fate of Wembley Stadium:

Wembley Stadium opened in 1923, in time for its use as part of the Empire Exhibitions of 1924-25. Such was that national interest in the stadium that the attendance at the first FA Cup Final to be held there in 1923 was more than double the expected attendance of 90,000 ... Since then, Wembley Stadium has been the site of the FA Cup Finals and Rugby League finals, and has been the venue for many events, both sporting and cultural, which have become an important part of the nation’s social history. These include the London Olympic Games of 1948, the England victory in the World Cup of 1966, and many musical events, including the Live Aid Concert in 1985.⁷⁵

There are obviously a number of different ‘communities’ who could claim that Wembley Stadium held particular social significance and value for them. Where there appears to be doubt as to the existence of *any* heritage significance, as recognised by the criteria set out in legislation and/or policy, the community’s vocalisation of a property’s social value is most important; as demonstrated by the case of Fernilee Lodge.

⁷² Government of Western Australia, *Hope for the Future: the Western State Sustainability Strategy – a Vision for Quality of Life in Western Australia* (September 2003) 224 (n 47).

⁷³ ‘In terms of the assessment of social value, “community” could be defined as *any* group of people recognisable or accepted to the wider community as being a “group” or “community”.’ (emphasis added): Christine Johnston, *What is Social Value?* (1992) 19.

⁷⁴ International Network on Cultural Policy, *Annual Meeting: Legal and Financial Instruments for Safeguarding Our Intangible Heritage – Executive Summary* (2003), <http://206.191.1917.19/meetings/2003/theme3_exec_e.shtml> 7 October 2004.

⁷⁵ Carolyn Shelbourn, ‘Twin Towers and Conflicting Demands’ (1998) 178 *New Law Journal* 1884, 1884.

The issue of indeterminacy of a group with an interest in a place creates a number of practical problems for effective community consultation. Massey argues that ‘places do not have single, unique “identities”’, and sets out that it is social relations that form the substance of places and that these relations can be wider and go beyond the ‘boundaries’ of any particular place.⁷⁶ Furthermore, Massey argues that places are never fixed because the identities and social relationships that make up the areas are dynamic in nature, thus making the identity of the place unfixed.⁷⁷ The result: the make-up of any group that might be considered to be a ‘group’ or ‘community’ within the meanings attributed by Christine Johnston⁷⁸ will constantly shift and change and often go beyond the confines or geographical boundaries of a specified area.

As long as so many layered identities can be perceived in association with the community of any given place, an evaluation of that community’s value judgments, as regards heritage significance, would appear to be a monumental task; a particular problem for law with regard to *locus standi*. It could even be the case that some of the population might not even appreciate that they are part of a particular group until the decision to demolish or develop has been made, by which time it is often too late to be heard.

2 Focus on the Material

The incorporation of intangible considerations that go towards social inclusion and the creation of meaningful environments into European-based Anglo-Australian heritage regimes will always be building on the foundations of the traditional approach; the fabric-focused approach. Jonathan Riley discusses this issue at length, with regard to an application for judicial review relating to an archaeological find in the United Kingdom.⁷⁹ Riley writes of cultural interests and refers to the intangible values that are so tricky to protect under our traditional legal framework for the protection of heritage. Any legal system that generally protects the physical person and property forces intangible ideals to ‘piggy back’ on values such as beauty, grandeur, historical associations and architectural excellence: in other words, intangible, inclusive values are subordinate to the traditional values.⁸⁰

Intangible values *are* being incorporated into European-based, Anglo-Australian heritage regimes, as evidenced by the cultural and social provisions of the *Heritage Places Act 1993 (SA)* and *Development Act 1993 (SA)*, but they are still playing second fiddle to material considerations, and are certainly not receiving the consideration necessary to assist in the creation of meaningful environments and

⁷⁶ Massey, above n 7, 155.

⁷⁷ Massey, above n 7, 168-9.

⁷⁸ Johnston, above n 73.

⁷⁹ See Jonathan Riley, ‘*Locus Standi* and Cultural Interests’ (1997) 1 *Journal of Planning and Environment Law* 20 for discussion on *R v Secretary of State for the Environment; Ex parte Rose Theatre Trust Co* (1990) 1 QB 504.

⁸⁰ *Ibid* 26.

social inclusion. As Munjeri states, we are living in ‘a world in which that which is visible, concrete takes precedence over that which is immaterial’.⁸¹

The current system in South Australia was never designed to take intangible values into account in heritage decision making – it is for this reason that these values are not being properly incorporated into important heritage decisions. It would seem that an overhaul of the heritage regime, in South Australia at least, is essential if the desired outcomes of social inclusion and meaningful environments are to be achieved.

VI THE WAY AHEAD: A FURTHER STEP TOWARDS INCLUSION

The system in South Australia should be reformed, but the mode of that reform will be tricky to devise.⁸² It is clear that intangible values must be a major aspect of any heritage reform; that they should certainly feature more prominently if the outcomes of the creation of meaningful environments and social inclusion are to be achieved.

It would seem that the current problems within the South Australian regime lie initially with a general misunderstanding of the function and form of intangible values. It is not possible to use the same process of decision making for intangible values under the inclusive philosophy of heritage as under the traditional heritage philosophy. It must be understood that intangible significance cannot be tacked on to aspects of the traditional theory as an after-thought or an add-on.

At the same time, any reform of the system must not be so restrictive as to deny the dynamic concept of heritage the flexibility it requires to shift and change. In any reform, there will have to be a delicate balance between issuing comprehensive guidance on decisions involving intangible values and leaving the system open to manage any further changes in heritage significance.

A new system would perhaps incorporate the following aspects.

A Increased Community Involvement in Heritage Decision Making

As discussed above, there has been a broadening of the meaning of heritage significance to include aspects that members of the general public would consider meaningful to their everyday lives as opposed to representative of some bygone era or upper-class agenda. The reason for this shift has been, amongst other things, the pursuit of social inclusion. The need to have the community involved in heritage decisions is derived from the fact that preconceived notions of significance cannot

⁸¹ Munjeri, above n 28, 13.

⁸² Interview with Brian Samuels, above n 66. Brian Samuels acknowledges that the current regime in SA is flawed but admits that he does not know if we can devise a system that would work any better.

be forced upon a target group⁸³ – these values must be determined by the group that are to gain the potential benefit from the heritage.

McManamon and Hatton point out that

[c]ommunities residing near or among the locations of cultural resources have important, sometimes critical, influences on the protection and preservation of these resources. Community members protect and maintain these resources when they regard them as their own. Graphic evidence of effective local preservation actions are the millions of historic structures worldwide that continue to be used, inhabited and maintained by their local owners and occupiers.⁸⁴

This speaks to the fact that a community will be more likely to sustain an environment if they feel some affinity with it. Under the current regime in South Australia, however, a lack of effective community consultation and defective decision making have precluded this happening for places of social value such as Fernilee Lodge.

Erica Avrami declares:

Developments in the conservation field over the past 20 years have produced a growing awareness of the need to undertake assessment of values – often referred to as ‘cultural significance assessment’ – as an integral part of conservation projects and as significant means of advancing the field. These efforts aim to ensure that interventions are responsive to a broad context of perceived meanings, issues, and communities and that they do not rely solely on art historical canons and technical traditions.⁸⁵

In the case of Fernilee Lodge, the decision to demolish the site due to a lack of heritage value was taken without a ‘cultural significance assessment’ and it is for this reason that the considerable social value of the site was not uncovered until it was too late. If the South Australian regime, and indeed any regime that is based on the traditional fabric-focused philosophy of heritage protection, is to achieve sustainability, the creation of meaningful environments and social inclusion, then it is essential that *adequate* community consultation be undertaken. This should certainly take the form of some type of cultural significance assessment. Further, there will certainly be logistical problems in carrying out a survey of the attitudes and feelings of these communities; what is important, though, is that there are mechanisms in existence to determine if there is any social value inherent in a place. To ensure that this happens, decision makers should be *bound* to carry out a

⁸³ On the communicative theory of planning, see John Forester, *Planning in the Face of Power* (1989); Patsy Healey, ‘Planning Through Debate: the Communicative Turn in Planning Theory’ in Frank Fischer and John Forester (eds), *The Argumentative Turn in Policy Analysis* (1993) 233.

⁸⁴ Francis P McManamon and Alf Hatton (eds), *Cultural Resource Management In Contemporary Society: Perspectives on Managing and Preserving the Past* (2000) 10.

⁸⁵ Erica Avrami, ‘Values and Heritage Conservation’ (2000) 15(2) *Conservation* 19, 20.

cultural significance assessment, as they would an environmental impact assessment. This *should* ensure that decision makers have to take into consideration any social value contained in the place.

Having the community involved in projects such as community mapping also ensures inclusion: communities can identify places that are important to them; it also helps to educate them as to their surrounding environment and foster a sense of attachment. Such a project is *Common Ground*, an initiative in the United Kingdom dealing in qualitative research of people's views of their environments in which their communities are based.⁸⁶

Once a community have identified the aspects of a place that make it significant to them, decision makers should have an easier job of making decisions that give adequate consideration to the relevant issues. In this respect, any reform of South Australian heritage law should be strong in binding decision makers to take certain issues into consideration. Such a provision will soon be enshrined in the Western Australian regime.⁸⁷

B *Flexible Heritage Legislation*

While legislation should bind decision makers to take certain considerations into account in making decisions about heritage, almost paradoxically legislation should also be more flexible. There might appear to be some conflict in this line of reasoning, but a look to the examples of Western Australia and the United Kingdom clarifies the issue.

The Sustainability Bill 2004 (WA) does not define 'sustainability' in the body of the legislation, but instead schedules the definition. Likewise, PPG 15, the guidance notes issued in order to interpret the *Planning (Listed Buildings and Conservation Areas) Act 1990* (UK), define what is to be considered of heritage significance as opposed to this definition being found within the body of the statute itself. This approach allows more flexibility in heritage legislation, as schedules or guidance notes can be amended to reflect current theory without having to alter the substance of the legislation. This is particularly important given the evolving nature of the concept of heritage. If any reform is to be made to the heritage legislation of South Australia to ensure room for evolution and inclusion, this method of lawmaking should be borne in mind.

VII CONCLUSION

The pendulum swing from recognition of traditional ideas of heritage to a more socially inclusive theory speaks to an emerging purpose of heritage regimes: a purpose of social inclusion through the creation of meaningful environments. This

⁸⁶ Common Ground, *Rules for Local Distinctiveness*, <<http://www.commonground.org.uk/distinctiveness/d-rules.html>> 26 January 2005.

⁸⁷ Sustainability Bill 2004 (WA), s 4(1)(a).

socially inclusive idea of heritage has only been incorporated superficially into the South Australian heritage regime, with no real measures to ensure the effective protection of the all-important intangible values. South Australia, along with other European-based heritage regimes, must learn to properly protect the modern, inclusive values of heritage through measures such as: continuing education of the heritage decision-makers; fact-finding schemes - for instance, cultural significance assessments and community mapping which will ensure that the opinions of the relevant communities are taken into account; the integration of various functions of government to enable a government-wide commitment to standards of sustainability and social inclusion; and drafting of legislation that goes some way towards guaranteeing relevant considerations being taken into account in decision making while allowing a flexible definition of heritage significance. This will not be a simple task, but it is necessary if the end result is to be the creation of meaningful environments.

Intangible values might never be adequately protected in a society that places so much importance in personal property rights and the physical aspects of place. As we learn more about the intricacies of attachment and sense of place for communities by asking them what it is that is meaningful to them, so we learn to better appreciate the intangible values that make up these places and what it is that makes a place meaningful. We may have been bequeathed a heritage regime that is inherently exclusionary in nature but, while we can never deny the foundations of our culture, society and legislative legacy, we can rethink them.