

10 September 2018

Environment, Resources and Development Committee

RE: HERITAGE INQUIRY

The Environmental Defenders Office (SA) Inc (“the EDO”) is an independent community legal centre with over twenty-five years of experience specialising in environmental and planning law. EDO functions include legal advice and representation, law reform and policy work and community legal education.

Heritage recognises important contributions from the past, provides understanding and value in the present and is our legacy for future generations. However, too often heritage protection is unreasonably and irrationally criticised as an impediment to economic development, despite mounting evidence to the contrary from overseas and in Australia that testifies to its value economically, culturally and environmentally. Benefits flow from conserving, servicing and adapting historic buildings, activity in heritage buildings, tourism and general conservation and education activities. Economic benefits include greater revenue in the economy and increased employment. Lastly, heritage has important environmental benefits which include reduced energy use through conservation and adaptation of existing buildings.

2018 marks the 40th anniversary of heritage protection legislation in South Australia. However in the last 20 years there have been no significant updates. In our view the State listing process works relatively well. This is not the case with local heritage where the lack of

consistency of heritage conservation advice and decision making has been identified as one of the weaknesses of the current policy and legislative framework. While the same criteria are used in assessing heritage places, these are not always consistently applied. The approach to heritage also varies widely from council to council, depending on available resources and local community attitudes.

It is critical to note that heritage listing alone does not guarantee against demolition and nor does it ensure the ongoing integrity of heritage assets. There has been a decline in the quantity and quality of protected heritage. Legislative and policy reform is needed to provide for a clear, transparent and accountable listing process, appropriate recognition of heritage values in planning matters and the promotion of investment in heritage conservation.

TERMS OF REFERENCE

- 1. HIGHLIGHTING THE DIFFERENCES IN, AND CONSISTENCY OF, PROCESSES AND CRITERIA BETWEEN LISTING AND ASSESSING LOCAL, STATE AND NATIONAL HERITAGE;**
- 2. HOW HERITAGE SHOULD BE MANAGED IN THE FUTURE; INCLUDING, BUT NOT LIMITED TO INVESTIGATING:**
 - A. HOW SHOULD THE PROCESS FOR LISTINGS (FROM INITIATION TO FINAL PLACEMENT ON THE APPROPRIATE REGISTER) BE MANAGED, AND BY WHOM;**
 - B. WHO SHOULD HAVE THE RIGHT TO BE HEARD IN RELATION TO LISTINGS;**
 - C. WHO SHOULD BE THE DECISION MAKER FOR LISTINGS AND REVIEW; AND**
 - D. WHAT PROCESSES SHOULD BE IN PLACE FOR THE REVIEW OF LISTINGS;**
- 3. WHAT IS THE RELATIONSHIP AND DISTINCTION BETWEEN 'CHARACTER' AND 'HERITAGE';**
- 4. HAVE THERE BEEN UNEXPECTED OR PERVERSE OUTCOMES?**

HERITAGE LISTING PROCESSES

Listing is one of a range of tools available to conserve, protect and enhance heritage assets. Local, state and national heritage policies and procedures serve different ends and are governed by different legislation. There are challenges with the existing system which have been recognised in many other policy documents and discussion papers, most recently by the Expert Panel on Planning Reform. Our submission discusses these challenges and makes a number of recommendations which the EDO believes will improve heritage protection in South Australia.

Commonwealth Heritage Places

There are currently 11 listed places in South Australia including the Adelaide GPO.

National Heritage Places

These are listed under the *Environment Protection and Biodiversity Conservation Act 1999*. The object is to identify, celebrate and preserve 'natural, historic and Indigenous places of outstanding significance to the nation'. However procedures for nominating and assessing places are complex with the result that over the last two decades only 114 places have been listed (an average of 6 per year). Of that number 9 are in South Australia.

State Heritage

The *Heritage Places Act 1993* allows for the identification and protection of places of value to South Australia and objects of non-Aboriginal heritage significance. Places include sites of geological, palaeontologic or archaeological significance. The South Australian Heritage Council (SAHC) is charged with administering the *Heritage Places Act 1993*. Its designated purpose is to protect and preserve places of significance to South Australia as a whole.

A State heritage place means a place entered either as a provisional or confirmed entry in the South Australian Heritage Register (the Register) or a place within an area established as a State Heritage Area. A State Heritage Area is established via a Development Plan. They are clearly defined regions with outstanding natural or cultural elements significant to South Australia's development and identity. Although State Heritage Areas are protected under

legislation, places within the area can be altered or developed as long as the work is sympathetic to the character of the area.

Anyone can lodge a nomination for state heritage listing. A place can also be identified by the SAHC itself or through a recommendation from a heritage survey. Nominated places are assessed against certain criteria outlined in section 16 of the Act. **Non statutory guidelines have also been developed to assist in the use of these criteria.**

The criteria are fairly broad but for a place to qualify only one criterion must be satisfied. The criteria would appear to require a place to have a heritage significance of State significance although this is not explicit in the Act. The significance required is not only of a State wide nature but must also generally be of a high standard. The criteria are similar to those of other states and territories.

If a nominated place is considered to be of State significance or that it should be protected while an assessment is carried out, it will be provisionally entered into the Register. **The SAHC makes decisions on both provisional listing and confirmation.** Such a dual role raises concerns as to objectivity and transparency. We note that at one time the roles were separated with a Register Committee making decisions on provisional listing.

When considering whether to confirm an entry the SAHC takes into account the listing criteria and is also bound to consider all written and oral representations. The Environment Minister can request the SAHC to remove a provisional entry if the Minister is of the opinion that its confirmation would be 'contrary to the public interest'. However, this process lacks transparency as there are no guidelines as to what is meant by this phrase and the Minister is not required to provide reasons for their decision.

Only owners of places and objects can appeal to the Environment, Resources and Development Court (ERD Court) against a decision to confirm or not to confirm the provisional entry. Nominators do not have a right to appeal against listing decisions but they can apply to the ERD Court to be joined as a party to the appeal. Landowners and the SAHC also have appeal rights to the Supreme Court. No appeal lies against the removal of a provisional entry at the direction of the Minister.

Local Heritage

Decisions to list local heritage are made by the Planning Minister based on criteria in section 23 of the *Development Act 1993* (and transferred to the *Planning, Development and Infrastructure Act 2016* (PDI Act)) Only one criteria has to be satisfied for listing.

At present successful nominations become amendments to local council development plans in accordance with the procedures set out in the *Development Act 1993* (DPAs). Once a draft local Heritage DPA is put on public exhibition (owners and the public can comment), then it is concurrently declared to come into interim operation on that date. In effect, once a local heritage DPA is on public exhibition, then the proposed heritage listings become “law”.

When making the decision the Minister is entitled to form an opinion based on the expert report supplied to them and in relying upon that expert evidence the Minister’s assessment is likely to be regarded as reasonable. It is the Minister’s satisfaction based on an opinion which will determine whether a place qualifies for local heritage listing. It is not necessary for the Minister to be informed of the base facts upon which the expert opinions are expressed. Unlike the position with respect to state listed places there is no right to appeal by either owners or third parties as to the merits of such decisions.

Besides local heritage places, the *Development Act 1993* also allows for the establishment of Historic (Conservation) Zones and Policy Areas (HCZs and HPAs) together with places designated in development plans as being contributory items. HCZs and HPAs are geographic areas identified in development plans. They have a particular historic character and should be used more widely. Contributory items are items located within HCZs and HPAs. Whilst not equivalent to local heritage places they do have heritage features which contribute to the historic quality of the Zone or Policy Area. They are commonly used to preserve the appearance of a streetscape without restricting the right of owners to make changes to the interior or less visible outer walls. However there are no statutory or other guidelines as to when it is appropriate to list such areas and items.

Character is also referred to in development plans but the distinction between character and heritage is not clearly understood. In our view local heritage is about the preservation of places that demonstrate important historic attributes to the local area and character is

about the look and feel of areas.

Once the PDI Act is fully operational nominations for local heritage will be assessed using the same criteria and successful ones will become amendments to the Planning and Design Code (PDC). Consultation will take place according to the recently endorsed Community Engagement Charter.

Having the listing of local heritage matters undertaken by the planning department and the Planning Minister creates a fundamental problem of regulatory capture. This is a form of government failure which occurs when a regulatory agency, created to act in the public interest, instead advances the commercial or political concerns of special interest groups that dominate the industry or sector it is charged with regulating. In this case the planning department has responsibility for listing local heritage but also promotes development including in some instances the demolition of such heritage.

The process generally is costly, cumbersome and lacking in transparency. This has led to outcomes such as some identical buildings not being listed leaving them at risk of demolition. In addition, Councils have quite variable types of local heritage listing, for example Adelaide City Council has no contributory items. Many councils have never commissioned surveys, and some who have commissioned them have failed to act on the consultants' recommendations. Where nominations have been made ultimately many have been refused without adequate explanation. A prominent example of this is the Planning Minister's decision in 2011-2012 to reject all but 78 of more than 400 nominations made by the Adelaide City Council. The reasons for decision making are scarce.

The EDO strongly recommends that heritage listing matters be dealt with in one statute. In our view we need to move away from a heritage hierarchy. We see all heritage as being significant but in different ways. State heritage is of importance to the whole of South Australia whilst local heritage is significant to the community in which it is located.

All nominations for heritage listing could be overseen by the SAHC aided by an Expert Panel which reviews nominations. The Panel could include representatives of ICOMOS Australia, the Institute of Architects, the History Council, and the National Trust of SA, along with

other experienced recognised experts in heritage assessment. The final step should be consent by the Minister for Environment. All successful nominations should be entered on the Register without the need for review by Parliament.

Our view is that primary responsibility for initiating assessments and recommending listings should remain with councils as they have the expertise and experience for this task. However councils need to be supported to survey heritage and those that have made surveys but not followed them up with listings should be required to put nominations forward. After there has been a recommendation for listing, nominations should be reviewed by the recommended standing committee of experts to confirm that they have met the requirements for demonstrating significance. Once listed they should only be reviewed to ensure consistency of information. Wholesale reviews should not occur as this can lead to downgrading or removal when this is not warranted. It should not be assumed that listings created under former criteria are in some way inferior to listings created under the current criteria.

The listing criteria are in fact broader than those applicable to the listing of a State heritage place and this has caused much confusion. There are unfortunately only non-statutory guidelines for interpreting the criteria in a policy document "Planning Bulletin, Heritage". One consequence is that the SAHC has received nominations which do not meet any State threshold whilst local listing is commonly used as a last resort.

In our view the criteria need to be reviewed and should additionally include listing restorable heritage buildings if inappropriate additions or modifications were removed, landscapes of contributing items individually not sufficient but together of overall heritage significance and properties over a certain age.

We strongly recommend that the system continues to recognise of all currently listed local matters and the important role of contributory items. A possible way to deal with all local heritage matters is to use a graded system of local heritage conservation similar to the English system. Grade I buildings would comprise places of outstanding individual heritage significance. Only a small number in each council area are likely to qualify for this

designation, which would require development approval for any changes to the exterior – front, rear and sides. Grade II buildings would comprise all other places currently listed as Local Heritage, which would continue to enjoy the present level of protection. Grade III buildings would comprise all places currently listed as Contributory Items. All areas where geospatial mapping shows clusters of Grade II and Grade III Local Heritage should be designated as HCZs. HCZs represent an important way to protect heritage and prevent perverse outcomes where identical buildings are treated differently as one is listed and the other is not. Councils which have never identified contributory items should review previous heritage surveys to identify groups of buildings which deserve a Grade III classification.

Finally, the role of the community in the listing process needs to be improved. Local heritage nominations should be community driven not the sole province of local government. Communities know what they value. Individuals and community organisations should be able to submit nominations for assessment by local councils at any time. This would encourage people concerned about the potential loss of heritage places to make their council the first port of call, rather than putting in a nomination to the SAHC for state listing. Communities should also be consulted as early on as possible in the nomination process, be informed as to the reasons for listing/ not listing and in certain situations have the right to appeal listing decisions.

RECOMMENDATIONS:

- One statute to cover all heritage listing matters
- Expert Committee of SAHC to review nominations for listing and make recommendations to the Environment Minister
- Retention of all currently listed heritage matters
- Use UK grading system for listing local heritage (including contributory items)
- Develop criteria for listing of HCZs and HPAs accompanied by the use of rigorous standards and guidelines and promote their use
- Expansion of criteria to enable consideration and listing of;

- restorable heritage buildings if inappropriate additions or modifications were removed
- landscapes of contributing items individually not sufficient but together of overall heritage significance
- heritage of a certain age
- Open public nomination system
- Automatic interim protection upon nomination of heritage places/items
- Listing to proceed automatically in the event that a nomination is not dealt with within 180 days.
- Gazettal of approved listings
- Public release of reasons for listing or non listing
- Owner and nominator able to appeal decisions
- Ministerial power to remove provisionally listed properties on public interest ground should be reviewed to include criteria for exercising this power and a requirement to make reasons publically available.
- Review listing only to ensure information is consistent and meets a certain standard.
- Mandatory heritage studies every four years
- Mandatory conservation management plans for listed matters to be prepared within two years of listing
- Mandatory local heritage committees to be established by Councils which oversee nominations and makes recommendations to the SAHC Expert Committee
- Repeal of PDI Act provision requiring 51% of landowners to approve a HCZ listing

HERITAGE LISTING AND PLANNING

As the concept of heritage has broadened to include precincts and areas, so the relationship between heritage and planning has become more critical. Planning strategies and policies developed in isolation from heritage run the risk of placing valued areas and precincts at risk. In general, the listing of a place as a State Heritage Place, local heritage place or as a contributory item within a HCZ or HPA and the location of land within these areas is relevant to the development assessment process.

Approval must ordinarily be obtained for the demolition, removal, conversion, alteration or painting of or addition to such a place or any other work that could materially affect a State Heritage place. Such applications together with applications that have the potential to materially affect the context within which a State heritage place is situated must be referred by the relevant planning authority to the Environment Minister and advice (from Heritage SA) must be provided within eight weeks.

The relevant planning authority must have regard to this advice when making their decision. If the authority proposes to not totally adopt the recommendation or any proposed condition it must refer the application to the State Commission Assessment Panel (SCAP) for concurrence. This means that the authority cannot approve the development without the concurrence of SCAP. Generally, the relevant development plan will contain specific provisions that relate to how development should be undertaken in relation to a State heritage place or how development which is in close proximity to a State heritage place should be undertaken.

Similarly, development applications are required for most activities affecting local heritage. Development plans also have provisions which are specifically related to local heritage. However unlike applications affecting State heritage no referral to Heritage SA is required.

Depending on the provisions in the applicable development plan applications such as proposed demolition in a HCZ or HPA the relevant authority may have a discretion to refuse consent. Any proposal to undertake development in these areas will be subject to specific provisions in relevant plans concerning how such development may be undertaken. There are also likely to be specific provisions applicable in the assessment of development proposals affecting contributory items.

In our view the planning system does not provide adequate protection for heritage assets. There is currently no integrated approach to heritage protection and heritage provisions are weak and inconsistently applied. Decision makers often prioritise the alleged benefits of the overall project over often significant impacts on heritage values.

In addition, certain policies have negatively impacted heritage such as the use of 'catalyst site' policies which permit the clustering of high-rise development throughout the City of Adelaide. These have undermined the character and amenity of the city centre and the degradation of heritage places. The use of random spot rezoning for major developments has undermined more visionary strategic planning processes and local planning outcomes. Instead of spot rezoning, a more comprehensive master planning approach is required where a wider range of economic, social and environmental factors are taken into account in the evaluation of major development proposals. Where high rise developments are involved, more sophisticated analysis and studies are required similar to those undertaken in British cities where very detailed appraisals are made of the immediate context including the likely impacts of the development on traffic movements, on the neighbourhood skyline, heritage values, the local urban grain, the existing streetscape character and important local views, prospects and panoramas.

In the interests of fairness and equity in decision making it is vital that the new PDC contains comprehensive heritage policies and explicitly recognises the heritage significance of all currently listed matters via a heritage overlay. In this way decision makers are required to consider the significance of the place, any applicable heritage study or conservation policy, and the impact of proposed building, alterations, works, subdivision, consolidation, signage and the like on significance, character or appearance of the heritage place.

To assist decision makers we recommend that South Australia has a well resourced and independent heritage advisory system. The extent of advice given depends on the significance of the development application. Where the impacts are so significant we recommend that the Environment Minister have a right of direction to refuse the application.

As with the listing process the planning system needs to ensure that the community have appropriate notification, complaint, consultation and review rights. Greater public participation leads to better more transparent and accountable decision making.

RECOMMENDATIONS:

- Planning policies which restrict:
 - Big box and high rise developments
 - Location and development of higher density developments
 - Subdivision of existing urban allotments
 - Obtrusive car parking
 - Removal of significant and regulated trees
 - Developments which impact views and vistas
 - Developments which impact public open space
 - Obtrusive signage and corporate badging
- Comprehensive heritage policies in all planning documents which include provisions as to the benefits of preserving heritage and prescriptive policies
- Heritage overlay in the PDC
- Environment Minister to have a right of direction to refuse planning approval where proposed development will significantly affect heritage assets and values
- Heritage professionals with at least five years practical experience in heritage conservation work to be co opted on to assessment panels.
- An independent and well funded Heritage Advisory system which provides different levels of advice depending on the planning application
- Automatic rejection of a demolition application if there has been intentional neglect of a listed property.
- Heritage Code of Practice for adaptation of heritage buildings.
- Minor works on heritage listed places exempted from planning approval only in well defined circumstances.
- Building regulations which encourage adaptive re use especially the upper levels of heritage buildings
- Allow permission for an otherwise prohibited use if the use would benefit the conservation of a heritage place.
- A public complaint process where heritage is deteriorating

- Appropriate public notification, consultation and appeal rights
- Public access to all heritage advice

TERMS OF REFERENCE 5 - ANY OTHER RELEVANT MATTER

INVESTMENT IN HERITAGE

South Australia's built heritage has experienced insufficient investment over many decades. Heritage owners bear most of the costs of conservation and need support to preserve these important public assets.

RECOMMENDATION:

- legislative incentives and support for private owners of heritage places including:
 - Self-perpetuating loan schemes which encourage individuals in low interest rate areas to participate in the scheme.
 - Local government and planning instruments provide incentives that encourage participation in heritage programs including planning incentives, transfer of development rights, flexibility in decisions on land use and land division, flexible application of building regulations for adaptation of heritage places, rate differential/reduction and other fee and tax concessions.

Please contact the writer on 8359 2222 with any queries.

Yours faithfully



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