

# South Australia

## The Laws Relating To Heritage Conservation In South Australia

This paper discusses the current legislative arrangements in South Australia in respect of both State and local heritage places. In doing so, it identifies some of the present inadequacies and anomalies that exist within this legislative structure. A case study is used to demonstrate one particular inadequacy in greater detail.

The inadequacies identified by the author are primarily her own observations, but regard has been made to submissions presented to the government at the time of the heritage review process in 1992 and government ministers' subsequent discussions of the Heritage Bill during Parliament in the following year.

### Introduction

Throughout Australia specific heritage legislation or development control procedures provide for and enable the identification, protection, conservation and management of items of local or State heritage significance. It is the government's responsibility to oversee and implement such legislation or procedures and the judiciary's responsibility to enforce compliance with the legislation or procedures. In most States, legislation exists establishing specialist heritage authorities which are responsible for the identification and protection of heritage items or places and setting up heritage registers listing such items or places.<sup>1</sup>

In South Australia, the legislation provides for the identification of two different types of heritage places: local heritage places and State heritage places. It also provides for State Heritage Areas to be established. The first difficulty in this respect is that these heritage places and areas are governed by two different Acts. *The Heritage Act 1993* primarily focuses on State heritage places whereas local heritage places are identified and regulated by the *Development Act 1993*. Regard, however, must be had to the Development Act for development of both a local heritage place and a State heritage place.

Interpretation and enforcement of all aspects of the two pieces of legislation is carried out in the Environment Resources and Development Court ("the Court"), which was established in 1994. Commissioners are appointed to this Court for their practical knowledge of, and experience in, the area of heritage.<sup>2</sup>

### The Heritage Act 1993

The *Heritage Act 1993* ("the Act") came into operation on 15 January 1994. It repealed the *State Heritage Act 1978* ("the old Act") and made consequential amendments to the *Aboriginal Heritage Act 1988*, the *Native Vegetation Act 1991*, the *Strata Titles Act 1988* and the *Valuation of Land Act 1971*. Its purpose is to conserve places of heritage value.

Under the Act a State Heritage Authority ("the Authority") is established consisting of eight members appointed by the Governor. Seven of these members must be persons with knowledge of, or experience in, history, archaeology, architecture, the natural sciences, heritage conservation, public administration, property management or some other relevant field and the other member must be a person with knowledge of, or experience in, heritage conservation nominated by the Local Government Association and approved by the Minister.<sup>3</sup>

The Act provides for the establishment of a State Heritage Register ("the Register"), in which State heritage places are listed. It also provides for the establishment of an inventory ("the Inventory"), which contains descriptions and notes relating to places designated in any Development Plan as a place of local heritage value, places which have been entered on a Commonwealth register, State Heritage Areas and heritage agreements.<sup>4</sup> The Register and Inventory are available for public inspection and copies of entries on the Register and Inventory can be obtained by any member of the public on payment of the relevant fee.<sup>5</sup>

It should be noted that the Inventory and places on the Inventory do not become registered places for the purposes of the Act, thus the provisions with respect to heritage agreements and offences under the Act only apply to State heritage places.<sup>6</sup> Unfortunately, this leaves a loophole for offences against local heritage places, unless the offence relates to unauthorised development of the place.

One anomaly which becomes apparent on an analysis of the Act, is the issue of State Heritage Areas. Under the Act the Authority must provide advice to the Minister on the conservation and public use of such areas and the Minister is able to enter into heritage agreements with the owner of land constituting a State Heritage Area, yet the establishment of these areas is done under council development plans and as such is dependent upon the particular council and not the Authority. Additionally, no criteria is set out in either the *Heritage Act* or the *Development Act* as to what comprises a State Heritage Area.

Section 16 of the Act sets out the criteria for determining whether a place has heritage value and therefore should be entered on the Register. These criteria are more expansive than those contained in the old Act and any one or more of the following will give a place heritage value:

- \* it demonstrates important aspects of the evolution or pattern of the State's history;
- \* it has rare, uncommon or endangered qualities that are of cultural significance;
- \* it may yield information that will contribute to an understanding of the State's history, including its natural history;
- \* it is an outstanding representative of a particular class of places of cultural significance;
- \* it demonstrates a high degree of creative, aesthetic or technical accomplishment or is an outstanding representative of particular construction techniques or design characteristics;
- \* it has strong cultural or spiritual associations for the community or a group within it;
- \* it has a special association with the life or work of a person or organisation or an event of historical importance.

The first case to consider the application of these criteria,<sup>7</sup> *Protopapas Pty Ltd v State Heritage Authority* (1994) EDLR 274 confirmed that provided a place satisfies any one of the listed criteria, then it has heritage value. In that case the Court held that the building, a former AMP building located in Port Pirie described as a "two-storey brick and stucco/cement-rendered structure built in the Victorian/Federation Free Classical style", satisfied criterion (a) because it demonstrated important aspects of the evolution of the State's history.

"In 1916, Port Pirie was enjoying a boom period. It was a busy port and the Broken Hill Associated Smelters had just been established to treat ore transported by rail to Port Pirie from the Broken Hill mines. These smelters were to become, within a very short period, the largest smelters of their kind in the world. The export of wheat was growing and the port was a major thoroughfare for this export trade as well as for the product of the smelters. In general, business was booming and the town had become an important commercial centre for the district, as well as a major industrial centre in the State.

This period in the development of Port Pirie was significant in the development of South Australia, and hence an important aspect of the evolution of the history of the State. The building erected by the AMP Society in 1916 reflected not only the confidence and expanding base of the AMP Society, which had been founded in Sydney in 1848 and established in South Australia in 1872 with a branch opening in Port Pirie in May 1900, but it also reflected the increasing importance of Port Pirie as a major district centre in the State. Not only did the fact of the AMP Society erecting a large building reflect the evolution of an increasing confidence by it in Port Pirie, but, more importantly perhaps, the quality and style of the subject building demonstrated, in its own way, at the time of its construction, the successful evolution of the town into an important district centre in the State."<sup>8</sup>

Registration of a place may be suggested either by the Authority or by any person. If the Authority considers that a place is of heritage value or that it should be protected whilst an assessment of its heritage value is carried out, it will provisionally enter the place in the Register. Upon provisionally entering a place in the Register, the Authority must give notice of the provisional entry to the land owner, the Minister and the council, if the place is

in a council area. The Authority must also advertise the provisional listing in a newspaper circulating throughout the State. Both the notice to the land owner and the advertisement must state that written submissions on whether the listing should be confirmed may be made within three months of the date of the notice.<sup>9</sup> (A similar process for removal of places from the Register exists.)<sup>10</sup> By the introduction of these notice requirements, owners and other interested parties are given the opportunity to have their views taken into account during the registration process.

Any person who makes a written submission is also able to make an oral representation to the Authority in respect of the listing. The Authority must then consider all the written and oral representations that it has received before it makes its decision on whether to confirm the listing. The Minister is given the power to direct the Authority to remove an entry from the Register, if the Minister considers that the confirmation of the provisional entry would be contrary to the public interest.<sup>11</sup> This power and a direction made pursuant to it were the subject of judicial consideration in *Australian Speleological Federation Inc v. Minister for Environment and Natural Resources and Ors* (1994) 177 LSJS 296, which will be examined in detail later.

Notice of the confirmation or removal of the provisional entry must be given to the same people to whom notice of the provisional listing was given and owners of the land must also be told what development they may or may not undertake on the place.<sup>12</sup> If the Authority's decision about whether or not to confirm the provisional listing is not made within 12 months of the provisional entry, then the provisional entry must be removed.<sup>13</sup>

The Act grants land owners who are unhappy about the Authority's decision the right to appeal to the Court. However, the owner must have made representations to the Authority in respect of the entry to utilise this right, and the appeal must be commenced within two months after notice is given of the Authority's decision.<sup>14</sup> Unfortunately, persons, other than owners of the land on which the place of heritage value is situated, who have made written and oral submissions do not have this right of appeal. This is different to the provisions which exist in the Development Act, which provide that persons who are entitled to be given notice of certain decisions relating to development of local heritage areas are entitled to appeal to the Court against that decision.<sup>15</sup>

To assist developers and land owners in planning for the future use or development of their land, the Act provides that a certificate of exclusion in respect to the land may be obtained from the Authority. If a certificate of exclusion is granted, the land may not be entered in the Register for a period of five years. Once again, the Act provides the opportunity for representations to be made as to whether the certificate should be issued.<sup>16</sup>

Protection for heritage places may be obtained by the issuing of Stop Orders. These may be issued where the Authority is of the opinion that a place has sufficient heritage value to justify its preservation, or evaluation is needed to determine whether its heritage value justifies its preservation and there is a need to protect the place. Stop Orders may specify that a person stop or not start any work or activity that may destroy or reduce the heritage value of the place.<sup>17</sup> If the Authority issues such an order it must immediately apply to the Court for confirmation of the order and provisionally enter the place in the Register (if it has not already done so). Failure to comply with a Stop Order could result in up to 15 years imprisonment or a fine of up to \$60,000.<sup>18</sup> The Act also provides special protection for places of geological, palaeontological or archaeological significance.<sup>19</sup> Like the old Act, this Act provides for Heritage Agreements to be entered into between the Minister and the owner of land in respect of registered places or State Heritage Areas. These agreements attach to the land and are binding on any subsequent owners of the land. They are also binding on the occupier of the land.<sup>20</sup> Their aim is to promote the conservation of registered places and State Heritage Areas and the public appreciation of their importance to South Australia's cultural heritage.<sup>21</sup> Enforcement of heritage agreements may be taken by either party to the agreement applying to the Court for an order.<sup>22</sup>

It is an offence to intentionally damage a registered place so as to destroy or reduce its heritage value, and as stated previously it is an offence to disobey a Stop Order. In addition to imposing penalties for these offences, the Court may also order that the offender make good the damage.<sup>23</sup> Further, the Court may also order that no development of the place may be undertaken for a period of anything up to ten years.<sup>24</sup>

## The Development Act 1993

*The Development Act 1993* ("the Development Act") came into operation on the same day as the Heritage Act and in respect to the issue of heritage sets out to control what development may be undertaken in relation to heritage places. The system of development control in South Australia is based on a series of development plans which are prepared by each council. Within these development plans, planning or development objectives or

principles may be set out in relation to, amongst other things, the management or conservation of land, buildings, heritage places and heritage areas.<sup>25</sup>

The Development Act also provides for the establishment of local heritage places, which are designated in Development Plans. The criteria used by councils to assess whether a place is a place of local heritage value are as follows:

- \* it displays historical, economic or social themes that are of importance to the local area;
- \* it represents customs or ways of life that are characteristic of the local area;
- \* it has played an important part in the lives of local residents;
- \* it displays aesthetic merit, design characteristics or construction techniques of significance to the local area;
- \* it is associated with a notable local personality or event;
- \* it is a notable landmark in the area.<sup>26</sup>

The system of development control is that a person must obtain development authorisation from either the council in which the particular place is located, or from the Development Assessment Commission ("DAC") in certain other cases, in order to undertake any development. Development in relation to a State heritage place is defined as the demolition, removal, conversion, alteration or painting of, or addition to, the place, or any other work that could materially affect the heritage value of the place. The same definition applies to local heritage places, although painting is not included.<sup>27</sup> Development also includes excavation or filling of land in a local heritage place which involves a volume of material exceeding nine cubic metres in total.<sup>28</sup>

Where a development application involves a development which directly affects a State heritage place, or may materially affect the context within which the State heritage place is situated, it must be referred to the Minister administering the Heritage Act and regard must be had by the council or the DAC to any response of the Minister when the development application is determined. It should be noted at this point that State heritage places are defined under this Act to include a place entered, either on a provisional or permanent basis, in the Register or a place within a State Heritage Area therefore regard will need to be had by the relevant planning authority to both the Register and the Inventory.<sup>29</sup>

The definitions contained within the Acts highlight the unsatisfactory position of having heritage areas regulated by two different Acts. For example, as mentioned earlier, the definition of a State heritage place in the Development Act includes "a place within a area established as a State Heritage Area by a Development Plan". 'Registered place', however, in the Heritage Act is defined as a "place entered in the Register". Thus, the situation could conceivably arise where even though places within State Heritage Areas are not on the Register, development control of these places is the same as that for State heritage places. One possible way of addressing this situation would be to list State Heritage Areas on the Register itself.

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1 Bates, G.M Environmental Law in Australia (3RD Edition) (1992) Butterworths, Australia  
 2 S 10, Environment Resources and Development Court Act 1993  
 3 S 4, Heritage Act 1993  
 4 S 14  
 5 S 15  
 6 An exception to this is State Heritage Areas, which may be the subject of a heritage agreement.

7	In the eighteen months since this Act has been in operation, this is the only case that has proceeded to a hearing. Only two other proceedings, involving the Act have been issued in the Court. One of these actions involved the Authority seeking to have a Stop Order confirmed; in the other action a compromise was reached.
8	<u>Protopapas Pty Ltd v State Heritage Authority</u> (1994) EDLR 274 at 279
9	S17
10	S 23
11	S 18(5)
12	S 18(7), Section 18(8)
13	S 18(9)
14	S 20
15	S 86(1)(b), Development Act
16	S 22
17	S 30
18	S 31
19	Part 5, Division 1
20	S 32
21	S 33
22	S 35
23	S 37
24	S 38
25	S 23(3)(a)(iv), <u>Development Act 1993</u>
26	S 23(4)
27	S 4 (1)
28	Development Regulations 1993, Schedule 2, section 2
29	Section 4(1)