



NATIONAL TRUST SOUTH AUSTRALIA

Port of Adelaide Branch
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Patron-in-Chief

Her Excellency

**The Honourable Frances Adamson AC
Governor of South Australia**

The Expert Panel,
Planning System Implementation Review
GPO Box 1815
Adelaide SA 5001

Dear Expert Panel Members

The Port of Adelaide Branch of the National Trust of South Australia (PoANT) welcomes the opportunity to contribute to the Independent Panel Review of the *Planning Development and Infrastructure Act 2016* (the PDI Act), the Planning and Design Code (the Code) and State Planning Policies.

PoANT was formed in October 2006 as a response to the community's growing concerns regarding the rapid changes that were underway in Port Adelaide and on the LeFevre Peninsula. The branch became the 49th branch in this state. We advocate for the conservation of our heritage through our own actions and through the support of the broader community.

Part 1 of our submission (at Annexure 1) provides a case study into how Character and Heritage Policy was addressed by the Code in the case of our recent lived experience of the Code Provisions - Wharf Shed 1, Port Adelaide. This takes up the invitation made by the Expert Panel at its 8 December online community consultation to provide examples – case studies – of areas of difficulty, contention and failings identified with the current system's assumptions and operations. Where our case study highlights questions posed by the Review, this is clearly indicated.

Part 2 provides a summary in response to other questions posed by the Review Committee in its General Discussion Paper and the Summary Paper on Character and Heritage.

Part 3 provides comment on Climate Change.

Please also note that a linked submission on trees was sent separately on 15 December by PoANT committee member, Michelle Hogan

By way of general comment, the options posed by the review summary papers are insufficient for considering whether the protections provided under the PDI Act, the Code and supporting instruments are sufficient to protect heritage and retain the character of neighbourhoods. We refer the Independent Panel to the 2018 ERDC Heritage Reform Inquiry (the findings of which were endorsed by the South Australian Heritage Council) which found that:

- A strategic and statewide reform of heritage processes and legislation is necessary, and that reforms to the nominations, assessment and listing processes for state and local heritage must result in places and areas that are protected by appropriate policy and legislative tools.
- Collaborative implementation of reforms is important in providing a future for the protection of heritage in South Australia.
- Clarity, simplicity, transparency, and accountability were important outcomes to achieve to increase community and stakeholder confidence in the processes for nominating, assessing, and listing state and local heritage, and certainty in development outcomes.
- A stable, long term funding base for management of heritage that results in a 'carrots' rather than 'sticks' approach to compliance; and
- A review or audit needs to be undertaken, using a statewide, collaborative approach to address gaps in the state's heritage listings.

These findings are later reiterated by the 2021 Legislative Review Committee Planning Reform Petition Report which makes it clear that the protections afforded by the PDI, and the Code are failing heritage. The review does not take up most of the (still largely unimplemented) ERDC recommendations.

We thank you again for the opportunity to participate in the review process, and trust that you find our advice informative and helpful.

Yours sincerely

Clare Shuttleworth
Chairperson
PORT OF ADELAIDE NATIONAL TRUST

ANNEXURE – DETAILED COMMENT

PART 1 - LIVED EXPERIENCE EXAMPLE – WHARF SHED 1

BACKGROUND

The subject of this case study is Allotments 201 & 202 in D110276, in the Hundred of Port Adelaide, City of Port Adelaide Enfield. It is located on the south-eastern side of the Port River, at the end of Commercial Rd at North Parade McLaren's Wharf. Upon this large (almost one hectare) site sits Wharf Shed 1, which for 30 years to August 2022 housed the Fishermen's Wharf Markets. The site is located next to the Port Adelaide Lighthouse Heritage Site and is adjacent to the Port Adelaide State Heritage Area.

Once an important feature of the bustling maritime economy, Wharf Shed 1, is now the last surviving wharf shed in the inner harbour. It is an eye-catching and iconic reminder of the culture and history of the Port of Adelaide.

Privately owned by Mr Hans Ehmann since 1994, the first application for demolition was made in June 2005. In 2016, a second application for both demolition and development was filed. This application became the catalyst for PoANT's application for Heritage listing of the building. PoANT's goal was to preserve the character and heritage narrative of the building in situ and to see it sympathetically developed for adaptive reuse.

The Heritage Council, however, did not recommend heritage listing in 2016...

"Some areas of the Port are of state significance while others, like the Fisherman's Wharf Market building, could be regarded as being more of local significance," deputy chair Carolyn Wigg said "The Heritage Council will be recommending that it be considered for local heritage listing by the City of Port Adelaide Enfield." But Port Adelaide Enfield Mayor Gary Johanson said that was unlikely, given the council did not have the ultimate power to stop development at the site." [Tom Fedorowysch ABC News 9 September 2016](#)

The Development Assessment Commission (DAC) subsequently approved demolition but required that substantial work begin on the site's demolition within 12 months, or the authorisation would lapse. Six years later, in March 2022, following the lapse of this approval, a third application for demolition was again lodged by Mr Ehmann's company, the Smith Group.

Despite the 2016 Heritage Council recommendation, the City of Port Adelaide Enfield did not pursue local heritage listing of Wharf Shed 1. The reasons for the public policy decision by the then Mayor have not been made available to PoANT, and in light of ensuing activity/decisions the council's inaction is deeply regrettable, as the last Wharf Shed on the South Eastern side will be lost to the community. To date, no Development Plan has been lodged and the building is now vacant. PoANT has a low level of confidence that the site will be redeveloped any time soon.

LIMITS TO LOCAL COUNCIL POWERS TO DETERMINE THE OUTCOME

PoANT presented submissions to the Council Assessment Panel (CAP) in March 2022 urging the rejection of the demolition due to the high risk of an extended period of heritage overlay non-compliance (PO 2.1).

PoANT's submission contended that the demolition of Shed 1 and the erection of fences and hoardings around the resulting vacant lot would represent a highly visible impact on the heritage streetscape of the area and would "...dominate, and unduly impact, on the setting of 3 adjacent State Heritage places.

The CAP Chair stated that, while there was significant sympathy for PoANT's application - that ***the building is iconic, has significant heritage value, should not be demolished and could be an important asset to adaptively reuse*** - there were "***no teeth in the Code***" to prevent the demolition application from proceeding. Specifically, as no development application was lodged, the Heritage Adjacency Overlay was unable to be assessed against the planning rules. The application for demolition alone, therefore, provided no buffer to consider appropriate plans for the development of this significant site

The argument that demolition would create a nearly one hectare eyesore vacant block creating a negative impact on local businesses, the State Heritage Area, the heritage listed Lighthouse, tourism, safety and local amenity was, therefore, moot.

PoANT contended that the application for demolition was unnecessary, potentially harmful to long-range community and local economic outcomes, and un-assessable without formal plans for developing the sites.

ROBUSTNESS OF CHARACTER, HISTORY, HERITAGE, OVERLAY AND/OR CONTRIBUTORY ITEM DEFINITIONS AND STATUS

The **Port Adelaide State Heritage Area** is significant due to it having the most substantial and continuous grouping of colonial buildings, many of which have direct associations with Port Adelaide's function as the State's major port. The eastern end of Wharf Shed 1 extends, and is **adjacent to a listed State Heritage Place**, Black Diamond Square, upon which is sited the former South Neptune Island/Port Adelaide Lighthouse (SHP 10313). **Heritage Adjacency Overlay** of the Code covers five metres of the site under consideration.

As stated earlier, because no development application was lodged, the Heritage Adjacency Overlay was unable to be assessed against the planning rules. The application for demolition alone, therefore, provided no buffer to consider appropriate plans for the development of this significant site.

The exclusion of detailed and nuanced local policy, that previously existed under the council development plans, has weakened heritage protections and preservation of character, and this will flow on to the development envisaged for the Shed 1 site

It is worth noting that previous, similar, community-led battles to save Port Adelaide's waterfront heritage from destruction centred around the demolition of Wharf Sheds 2 & 3 in 1994 (still vacant land 28-years on), the Boat Yards in 2009 (still vacant land 13-years on). All of these sites were recommended for heritage listing, all were demolished without plans for future development.

It is further worth noting that Shed 26 – the last standing industrial structure on the North Western arm of the Port River (currently under development) had its heritage listing overturned by the Minister for Environment and Heritage on ‘public interest’ grounds. PoANT wrote to the-then minister seeking to establish what the public interest in this matter was but did not receive a response before the government’s term ended in March 2022.

1. WHAT, IF ANY, DIFFICULTIES HAVE YOU EXPERIENCED AS A CONSEQUENCE OF THE NOTIFICATION REQUIREMENTS IN THE CODE? PLEASE ADVISE THE PANEL OF YOUR EXPERIENCE AND PROVIDE EVIDENCE TO DEMONSTRATE HOW YOU WERE ADVERSELY AFFECTED.

Public notification of the most recent demolition plans demolition application (ID 210 5748) was released online on 28 Dec 2021. The opportunity to comment was severely compromised by the short timeframe and poorly publicised process, as documented below.

The demolition application notices (two A3 posters) were totally inadequate for such a vast site and building. Neither of the signs were easily visible, there were none on the building itself (where people approach and enter the building) and the stake-mounted sign on North Parade was totally obscured amidst a plethora of other signs and shrubbery.

PoANT was approached by local residents remarking on the short timeline to comment – mainly because they did not see the signs. Due to its location, the site is of public interest, and is in a commercial area where it has economic, as well as heritage, impacts on a great number of stakeholders.

The notification requirement to inform affected parties within ‘60 metres’ captures adjoining landowners only. In the case of Shed 1 this comprises the applicant (who owns the adjacent Quest apartments, and the vacant lot next to the lighthouse and several commercial properties, but no residents. the majority of whom live outside of that notification radius, yet whom could/would be notably impacted upon by the application and later development. Impacts are too often FAR greater than the 60-metre area surrounds.

This problem could be addressed by restoring elements of the previous planning system that provided for councils as relevant authorities to have discretion over who received a notification letter. The current system doesn’t allow councils to do this – yet local councils are far more likely to know the public interest value, to have a nuanced view of ‘notable impact’ and to exercise local accountability to their ratepayers for ensuring adequate public notification. Council value (including local knowledge and expertise) must be restored to the public notification process.

Timing of the notice over the Christmas-New Year period also hampered local awareness, transparency, and stakeholders' ability to respond to the public notification. At this time, local residents are either away or taken up with the demands of this busiest period on the social and spiritual calendar. It is fair to say that the Shed 1 markets were attended by tourists and residents outside of the Port region over this period. Arguably they could not be expected to know of previous attempts to save the building to be able place it in the context of larger campaigns to protect the Area’s disappearing heritage, character and identity.

PoANT's campaign to promote awareness of the demolition application was extremely well-received by market patrons from all areas who had not been aware of the application or of the Shed's history. PoANT advocated for better transparency and an extended consultation period for the demolition application.

PART 2 - RESPONSES TO OTHER PANEL QUESTIONS

GENERAL COMMENTS

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The successful Shed 1 demolition application highlights problems with the absence of an integrated approach to heritage protection in the planning system, particularly where the heritage provisions within the Code are weak and easy to circumvent or overturn as we found out to our great local and state heritage loss with the destruction of the heritage listed Shed 26.

The SA Parliament Environment Resources and Development Standing Committee (ERDC) report realistic represents the scale of protection and change needed and reinforce our concerns regarding the inherent risks of Prongs 1-3, as outlined below.

The PDI, the Code and the *Heritage Places Act 1993* need to better be aligned to protect our built heritage.

2. RE: PRONG 1: ELEVATE CHARACTER AREAS TO HISTORIC AREAS SUPPORT AND HELP COUNCILS TO UNDERTAKE CODE AMENDMENTS TO ELEVATE EXISTING CHARACTER AREAS TO HISTORIC AREAS. THIS ALLOWS DEMOLITION CONTROLS ACROSS A BROADER AREA WHILST MAINTAINING THE INTEGRITY OF THE CODE.

- We are concerned about resources, standards, and accountability. Councils are already reporting that they are struggling to keep up with Code assessment requirements and this proposal, as a significant new piece of work with no additional resourcing, would only add to the current burden.

3. IN RELATION TO PRONG TWO (2) PERTAINING TO CHARACTER AREA STATEMENTS, IN THE CURRENT SYSTEM, WHAT IS AND IS NOT WORKING, AND ARE THERE GAPS AND/OR DEFICIENCIES?

- The proposal raises concerns about councils shouldering the workload and responsibility, and highlights the need, as noted by ERDC that unless there are standards (informed by appropriate heritage expertise and contextual knowledge) and accountability for their implementation the protections will be hit-and-miss. Standards have previously been recommended to ensure consistency across councils and regions. KPI's can hold relevant authorities and developers to account for meeting those standards. PoANT also notes that this could also deter practices and business models/practices that target areas where it is 'easier' to demolish and develop.

4. NOTING THE PANEL'S RECOMMENDATIONS TO THE MINISTER ON PRONGS ONE (1) AND TWO (2) OF THE COMMISSION'S PROPOSAL, ARE THERE ADDITIONAL APPROACHES AVAILABLE FOR ENHANCING CHARACTER AREAS?

- The protections and reforms outlined here go part way to addressing the current endangerment of character and heritage but cannot address systemic failings. We refer the Panel to ERDC recommendations.

5. WHAT ARE YOUR VIEWS ON INTRODUCING A DEVELOPMENT ASSESSMENT PATHWAY TO ONLY ALLOW FOR DEMOLITION OF A BUILDING IN A CHARACTER AREA (AND HISTORIC AREA) ONCE A REPLACEMENT BUILDING HAS BEEN APPROVED?
- Enforced, this provision may have prevented the successful demolition application for Shed 1. From a community interest perspective this would be a good outcome. However, to work, it relies upon successful implementation of Prongs 1-2. We fear many demolitions will occur before the system has built these protections in.
6. WHAT WOULD BE THE IMPLICATIONS OF HAVING THE HERITAGE PROCESS MANAGED BY HERITAGE EXPERTS THROUGH THE HERITAGE PLACES ACT (RATHER THAN PLANNERS UNDER THE PDI ACT)?
- By posing this question, is the Review calling the value and effectiveness of PDI Section 88 into question. This scheme was to ensure that accreditation fits the specific function or role that an accredited development assessment professional is to perform (e.g. heritage assessment), and to specify this in relation to heritage assessment.
 - Accreditation does not equal knowledge - expertise should include local nuanced knowledge and adequate resources, wherever the heritage authority sits.

WHAT WOULD BE THE IMPLICATIONS OF SECTIONS 67(4) AND 67(5) OF THE PDI ACT BEING COMMENCED?

- This would be a disaster for local and state heritage. PoANT agrees with the ERDC recommendation, the NTSA and Local Government Association (LGA) policy views that that these provisions should be REPEALED.

OTHER areas that we wish to comment on

7. WHAT, IF ANY, DIFFICULTIES HAVE YOU EXPERIENCED AS A CONSEQUENCE OF THE PATHWAYS FOR APPEAL IN THE CODE? PLEASE ADVISE THE PANEL OF YOUR EXPERIENCE AND PROVIDE EVIDENCE TO DEMONSTRATE HOW YOU WERE ADVERSELY AFFECTED.

The public is rightly feeling disconnected by the current public notification provisions and the effective loss of our Third-Party appeal rights.

Under the previous planning system, neighbours to a property where a development was being proposed were able to make representations on certain development applications. These neighbours, known as third-parties or representors, had rights to appeal a decision of the Relevant Authority in relation to a proposed development . The Environment, Resources and Development (ERD) Court could also review a decision. However, under section 202(1)(d) of the POI Act, third-party rights to make representations and appeal only exist with the very few developments that are classified as restricted, where SCAP is the relevant authority. Appeal to ERD Court is only available to those who lodged the development application in question, or a relevant party who can prove their interest in the development application. The experience of other heritage advocates, specifically have demonstrated how extremely difficult it is to 'prove' this interest and to achieve an appeal hearing

The loss of Third-Party Appeal rights was the central reason behind the mass destruction of significant and regulated trees at the Cedar Woods Glenside Hospital Development. At the time, Burnside residents and the Environment Defenders' Office (EDO) vociferously opposed the development proposal on grounds that are perhaps now much better understood – regarding the irreplaceable role of mature urban forest in climate resilience, the loss of place intimately tied to community wellbeing and identity. With no recourse to appeal in the Glenside DA, their representation of community interest could not have an equitable hearing of validated scientific and community concerns. Today, less than a decade later, with wider awareness of the climate risk we all face, better understanding of the interconnectedness and importance of urban greening strategies, and far greater government appetite to unwind Adelaide's tree canopy loss, we can only speculate on whether a different outcome might have been reached.

8. INACCESSIBILITY OF THE CODE AND ITS INSTRUMENTS, INCLUDING THE PLAN SA WEBSITE AND E-PLANNING PORTAL/SYSTEM

The Code is now over 4000 pages long, and extremely difficult to access and establish comprehension of.

The jargon associated with legislation and definitions, while important for compliance and good governance, can limit the spirit of what the Code is trying to protect regarding the *value* of heritage.

Heritage is about more than artefacts, buildings, memories, and history. It is about the accumulated culture of communities, something that can provide resilience in the face of challenges to livelihoods. It is, therefore, also about local and State economics. It is not solely about the investment aspiration of speculators or real estate developers.

In many ways the legal jargon of the Code, its associated regulations, and previous planning legislations make the Code confusing for communities concerned about preserving the true value of heritage.

The Code notification triggers are either hard to ascertain or complex and varied making it challenging to compare differences between notification triggers in the Code compared to the Development Plan, (in other words, to see if 'like for like' applies) without seeking further advice from professional planners who would be prepared to undertake road testing of the triggers on our behalf.

Large numbers of development applications are now removed from any form of public scrutiny through deemed-to-satisfy and deemed-consent processes, reduced public notifications and a failure to implement the direct public notification facility mandated under section 48 of the PDI Act.

The public can't find notifications on the system. In our experience it is not possible to cross tabulate development applications with overlays, including heritage overlays – making the system disjointed and obscuring of rather than facilitative of an integrated overview. The notifications subscription service is poorly advertised and unwieldy, with limited search capability. Moreover it is impossible to obtain an integrated overview of applications by precinct or overlay area (eg heritage overlay). So it is no surprise to us that the She 1 demolition application was not picked up through the online process.

9. ARE DEEMED CONSENT (DEEMED TO SATISFY) PROVISIONS UNDER THE PDI ACT EFFECTIVE?

Currently where a proposed development meets the deemed-to-satisfy criteria, the application must be granted planning consent under section 106 (Deemed-to-satisfy) of the POI Act . Section 106 states:

- (1) If a proposed development is classified as deemed-to-satisfy development, the development must be granted planning consent.
- (2) If a relevant authority is satisfied that development is deemed-to-satisfy development except for 1 or more minor variations, the relevant authority must assess it as being deemed-to-satisfy (and that determination will then have effect for the purposes of this Act).
- (3) A planning consent under this section must be granted without undertaking a process for public notification or submissions in relation to the proposed development.

PoANT is aware that bad developments are occurring under the Code provisions because private certifiers are not intimately aware of localities where they are approving the developments.

We are also aware that rather than streamlining the application process, the new planning system is creating additional work for councils. The increase in materials that each council area must be across, coupled with the demands of learning the new e-Planning system, has placed enormous pressure on council staff processing planning applications after implementation of the Code.

The LGA has separately submitted that council staff are putting in additional time to process applications within the strict timeframes imposed to avoid applicants receiving 'deemed planning consents' under section 125 (Time within which decision must be made) of the PDI Act. Subsequently, planners' energy has shifted from negotiating a good planning outcome to numbers game where they are racing against the clock to get it complete. The development may not be desirable and may not stack up, but there is simply not enough time afforded by the current system requirements to deal with the risks. In practical terms, some developments are slipping through the cracks.

10. IS AN ALTERNATIVE PLANNING REVIEW MECHANISM REQUIRED? IF SO, WHAT MIGHT THAT MECHANISM BE (I.E. MERIT OR PROCESS DRIVEN) AND WHAT PRINCIPLES SHOULD BE CONSIDERED IN ESTABLISHING THAT PROCESS (I.E. COST)?

We are community advocates, not planners and planning lawyers. As such we decline the invitation to propose alternative instruments. We ask the Review Panel to note that higher order principles of evidence led guidance, local knowledge and authority, procedural fairness, access, accountability, and transparency, and exercise of the spirit and intent of the Community Charter should apply.

PART 3 - CLIMATE CHANGE

In its 2022 election campaign the Government committed to addressing climate change in the PDI Act implementation review (including the Code), to address constituent concerns.

The opportunity existed to better integrate these and other considerations (specifically climate resilient land use and built form and State Planning Policy 5 (Climate Change - SPP5). The focus on better tree protection, rebuilding tree canopy, water sensitive urban design and other issues raised through the independent review are important, but are of themselves insufficient considerations.

That no work was undertaken to inform public discussion or contemplate several key review areas is a missed opportunity, and the Government's commitment is not fulfilled by the review process to date. Nonetheless we submit the following for reflection and welcome all opportunities to provide input in further discussions, should these arise.

- South Australian Government Climate Action 6.1 states that the government will strengthen climate smart planning, building and design policies and their implementation in the planning system, with a land use planning system that will continue to identify and implement improvements in planning policies, practices and assessments for low emissions and climate resilient planning and development. To address the climate emergency (which we note was declared by Parliament earlier this year; we must reach net zero by 2040. To have any hope of holding warming to under 2 degrees Celsius we must tackle the massive construction and transport footprint, and our aspirations for adaptation and resilience must be reflected in enforceable policy.
- SPP5 specifies policies and principles that are to be applied with respect to minimising adverse effects of decisions made under the PDI Act on the climate and promoting development that is resilient to climate change.
- SPP5 principles state that development trends and land supply considerations need to be informed by climate considerations to avoid adverse impacts. But the policy itself lacks 'teeth' and scope – for example to influence impacts that might be considered trivial from a development perspective that may have unknown or unintended impacts on future environmental reliance and climate preparedness. It can also be difficult to identify and protect landscape features that should be protected due to their contribution to climate resilience.
- Land use planning is an essential instrument to reduce emissions and building design guidelines can help to accelerate low emissions development. Both can assist communities to adapt to the inevitable consequences of climate change. PoANT acknowledges promising emerging work to map the urban canopy and heat islands. However this does not translate into a 'climate risk' overlay to

decision makers, developers, and the community or to be a trigger for development considerations. This needs to be urgently addressed.

- SPP5 should be revised to specify climate risk scenarios and timeframes, should contemplate much longer development timeframes. The Act, the Code and the policy should provide for managed retreat from areas that climate change is rendering unsafe for future human habitation development and other uses.
- The Code will have the most impact in ensuring climate-focused outcomes are considered in new development submissions but will have no impact in consideration of reducing emissions in demolition and rebuild/reuse of existing structures.
- South Australian land use policy needs to be integrated with transport policy that supports low emissions.
- Although evidence of climate change impacts on cultural and built heritage is limited, it is growing and compelling. Government should lead the way in developing a climate lens/guidance for heritage protection.