



OmbudsmanSA

# FINAL REPORT

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South Australian Heritage Council

24 August 2012

Ombudsman SA  
PO Box 3651  
Rundle Mall SA 5000

Telephone	08 8226 8699
Toll free	1800 182 150 (outside metro SA only)
Facsimile	08 8226 8602
Email	<a href="mailto:ombudsman@ombudsman.sa.gov.au">ombudsman@ombudsman.sa.gov.au</a>

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## Final Report

Date complaint received	13 September 2011
Complainant	Mr Trevor White
Agency	South Australian Heritage Council
Issues	<ol style="list-style-type: none"><li>1. The chair of the SAHC should not have exercised delegated powers under the <i>Heritage Places Act 1993</i> in relation to the Cheltenham grandstand</li><li>2. The SAHC wrongly failed to issue a stop order regarding, and to provisionally list, the Cheltenham grandstand under the Heritage Places Act.</li></ol>

### Jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*. It concerns the demolition of the Wyndham Hill Smith Grandstand at the Cheltenham Racecourse (**the grandstand**).

The South Australian Heritage Council (**the SAHC**) is an unincorporated body established for a public purpose by section 4 of the Heritage Places Act. Under that Act, the SAHC is responsible for the state heritage register (**the register**).

On 14 November 2011, I informed the chair of the SAHC and the complainant that I had determined to elevate the investigation to a full investigation.

I note at the outset that Ms Martha Savva, a senior solicitor in my office, was a member of the Heritage Register Committee of the SAHC from 3 April 2009 until 15 June 2011. While Ms Savva, along with all of the committee members was advised of the fact of the nomination received on 24 June 2011 (see below) she did not take part in any deliberation or consideration of the application or its merits.

## Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from the SAHC
- seeking more particulars from the complainant, and considering additional information provided by him
- seeking information from the former Land Management Corporation (**the LMC**)
- considering the Heritage Places Act, the *Public Sector Act 2009*, the *Public Sector (Honesty and Accountability) Act 1995*, the LMC Charter; Heritage Council Guideline - Meetings 18 March 2011; Crown Solicitors Office Legal Bulletin No 5 Conflicts of Interest of Members of Statutory Authorities; and the Department of Premier and Cabinet publication *Honesty and accountability for members of government boards* March 2011
- preparing a provisional report and providing it to the SAHC, Ms Judith Carr (the chair of the SAHC) and the LMC for comment
- considering the responses to my provisional report
- preparing a revised provisional report and sending it to the parties for comment
- considering the parties' comments in response to my revised provisional report
- interviewing Ms Carr on affirmation
- preparing this final report.

## Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.<sup>1</sup> It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...<sup>2</sup>

## Responses to provisional report

The SAHC responded by letter from its acting chair, Ms Carolyn Wigg, dated 3 July 2012. Ms Wigg made the following points:

- the SAHC has taken a number of steps since it was informed of this complaint, to ensure that errors made do not re-occur. Ms Wigg advised me that these are:
  - Staff supporting the Council have now received training on the provisions of the Heritage Places Act 1993 (the Act), including the use of stop orders under section 30 and section 17(2) of the Act
  - Procedures have been developed for staff supporting the Council on ways to ensure that all recommendations to the Council and its delegates are procedurally correct.
  - The Council's Policy and Governance Committee has been asked to develop a Complaints Policy and a policy on the [sic] Conflict of Interest.

<sup>1</sup> This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at 449-450 per Mason CJ, Brennan, Deane and Gaudron JJ.

<sup>2</sup> *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

- At its June 2012 meeting Council approved delegations to provide the Acting Chair (Deputy Chair) with the same delegations-as the Chair to ensure that there are alternative delegates to deal with conflict of interest situations.
- The Council's Criteria Working Group has been asked to broaden its role to include development of a brochure to accompany nomination forms and enquiries by the general public to explain how State and local heritage significance are determined.

In relation to the heritage significance of the Cheltenham Grandstand (the Grandstand):

- The Council asked the Manager of the Heritage Policy Unit to write to Mr White apologising for the procedural error which occurred on 5 September 2011 and to arrange for a formal assessment of the Grandstand to resolve the nomination.
  - The Acting Manager of the Heritage Policy Unit received the formal assessment of the Grandstand and made a decision under delegation on 16 January 2012 not to provisionally enter the Grandstand as it did not meet the criteria under section 16 of the Act.
  - In keeping with the direction of the draft Complaints Policy, following the receipt of a complaint regarding this decision by Mr Ray Hill, member, Cheltenham Parks [sic] Residents Association, the Manager of the Heritage Policy Unit wrote to Mr Hill and informed him that he may re-nominate the Grandstand. Following further correspondence from Mr Hill dated 30 March 2012, she agreed to his request that the assessment report be prepared by a heritage professional not involved in preparation of the earlier assessment report. This assessment will be completed in the near future.
- she confirmed that the SAHC has no staff of its own and is reliant on resources provided by the then Department of Environment and Natural Resources (**DENR**) (now the Department of Environment, Water and Natural Resources (**DEWNR**)). A reduction in capability in support provided to the SAHC has impacted on the quality and timeliness of advice received by the SAHC; and on its administrative practices
  - over the past 3 years, Ms Judith Carr as chair of the SAHC 'has exhibited behaviour in keeping with the highest ethical standards and codes of conduct required for all public boards and committees'. Ms Wigg considers that if Ms Carr had been aware that she may have had a conflict of interest she would have declared it and not made a decision under delegation
  - she notes that the report states that the Manager of the Heritage Policy Unit also has delegations and infers that she could have exercised these on 5 September 2011. Ms Wigg commented that 'given the argument outlined in terms of the role of the LMC and the Grandstand site, in context of LMC being a government agency, the Manager as a government officer may also have had a perceived conflict of interest'
  - she comments that 'the concept of perceived conflict of interest might also apply to Ms Savva's investigation of a complaint related to a body to which she reported as a member of its Register Committee, although her membership predates the recent actions taken regarding the grandstand'
  - the provisional report states that the grandstand was considered for the state register in 2009 and rejected. Ms Wigg notes that the 2009 nomination was for the racecourse as a whole, including the Slade Gates
  - the SAHC has continued its predecessor's practice of seeking Crown Solicitor advice on the interpretation of its responsibilities under the Heritage Places Act
  - she drew attention to the SAHC's recognition and valuing of the passion nominators feel for the places they wish to protect, and its view that 'nominating place of local heritage value for the State Register is not a panacea for inaction by local councils'
  - the Heritage Places Act requires the SAHC to consider each nomination for the register on its merits; and that there is a remedy available for owners of places that are potentially subject to re-nomination or serial nominations through an application under section 22 of the Heritage Places Act for a 5 year certificate of exclusion from nomination.

The SAHC chair, Ms Judith Carr, wrote to me by letter dated 29 May 2012 commenting on the provisional report. Ms Carr made the following points:

- she accepted that given his particular knowledge, the complainant may have perceived that she had a conflict of interest. She supported the comments in the provisional report about the necessity to declare any actual, potential, perceived conflict of interest, or conflict of duty
- she noted that a person who was aware of these obligations ‘must first be in possession of sufficient facts to be alerted to the necessity of making a judgement about whether one of these conflicts may exist’
- she stated that she was not in a position to be alert to any potential or perceived conflict, because she was not aware that ‘the Cheltenham Grandstand had been part of land subject to LMC Board advice in the past’. She said that she only became aware of this fact after the complainant raised the matter with me. She stated that:
  - the detailed dealings on the matter occurred 2 years before her appointment to the LMC board
  - discussions at board level after her appointment concerned the St Clair land, the related land swap and community concerns about open space
  - I did not provide any evidence in the listing of documents in paragraph 28 of my provisional report that she ‘should have been in possession of the fact that the LMC Board had been involved in regard to a development that included the Cheltenham Grandstand’
  - the LMC Board did not visit the site while she was a member
  - she had not visited the website quoted in my provisional report
  - only in responding to my request for information made on 5 October 2011 did she become aware of the advisory role that the LMC board played
  - when she received advice from the heritage officer in DENR of the urgent need to consider whether to issue a stop order, she ‘simply did not know’ of the past role of the LMC board
  - she was not advised by officers in DENR that it was unlawful, unethical or inappropriate that she should exercise her delegation in relation to the Cheltenham Grandstand, in view of her membership of the LMC board
- she considered that, because she was unaware of the potential for members of the community to perceive a conflict, the provisional finding that she ‘did not appropriately manage her perceived conflict in accordance with the code or the guidelines’ was unjust, and based on an incorrect assumption about her knowledge on that day
- in relation to Ms Savva’s role as noted under the heading ‘Jurisdiction’ above, Ms Carr stated her view that Ms Savva has an actual conflict of interest, because for Ms Savva’s entire term of as a member of the Register Committee of the SAHC, Ms Carr was the chair. Ms Carr noted my comments in relation to the nomination, but stated that this investigation does not relate to the nomination but to her actions as chair and delegate of the council. Ms Carr stated that she did not have sufficient information to know how it was determined that Ms Savva had no conflict and could act impartially and without prejudice in this investigation
- she expressed her concern, as a matter of natural justice, that she was not interviewed prior to the formation of my provisional view about the circumstances of her decision on 5 September 2011 and the reason why she did not form a view that there was a potential, perceived or actual conflict of interest in her membership of the LMC board and her role as a delegate of the SAHC in this matter.

I considered these comments, and took account of them as I considered appropriate in preparing my revised provisional report.

In relation to Ms Wigg’s and Ms Carr’s comments about Ms Savva’s role in this investigation, I note that the views expressed in my reports are views which I have formed personally. Ms Savva’s role has been limited to the collection of evidence and the provision of advice to me, and she has had no decision-making role. Therefore, no question of conflict of interest arises.

The Urban Renewal Authority confirmed by email dated 28 June 2012 that it had no comment on my provisional report.

### Responses to revised provisional report

The Chief Executive of the URA responded to my revised provisional report by letter dated 17 July 2012. He commented that:

- much of the material which outlines the LMC's role in the Cheltenham racecourse development predates Ms Carr's appointment to the LMC Board. In relation to documents released more recently under FOI, Ms Carr would not necessarily have had any knowledge of the existence of those documents
- notwithstanding a newspaper report to the contrary, the LMC played no part in the tender, procurement or selection of developers for the Cheltenham racecourse site
- the deliberations of the former LMC Board may be important in assisting me to finalise my determination. In this context, he noted:

Advice by the former Chief Executive of the LMC based upon a review of the minutes of all LMC Board meetings following Ms Carr's appointment concluded that there was no consideration at any LMC Board meeting post Ms Carr's appointment in relation to the demolition or use of the Cheltenham Park Racecourse Grandstand or the sale or subsequent development of the racecourse. The only matter considered by the LMC Board during Ms Carr's term of appointment (at a meeting on 24 November 2008) related to the proposed Cheltenham Aquifer Storage and Recovery System. I understand that a copy of the LMC Board paper relating to this matter has been provided to your office previously.

The complainant responded to my revised provisional report by letter dated 25 July 2012. He made the following points:

- he was unaware of a nomination to the register made in 2009 of the whole of the Cheltenham racecourse. He noted that in November 2008 a member of his association nominated 'various features ... for heritage listing, namely the brick wall along Torrens Road, a stand of seven eucalyptus trees, the Slade gates and an exotic significant tree'
- he noted that his association would shortly be re-nominating the grandstand for state heritage listing
- he asserted that Ms Carr was in a position to be alert to a potential or perceived conflict, because she either was (or should have been) aware that the grandstand had been part of land subject to LMC Board advice in the past; and he provided evidence in support of his position. This included:
  - the fact that at the time of her appointment to the LMC Board on 28 February 2008 Ms Carr held the position of Executive Director, Building Management, Department of Transport, Energy and Infrastructure (DTEI) (now the Department of Planning, Transport, and Infrastructure (DPTI))
  - on 28 November 2004, the Hon Patrick Conlon MP (the Minister for Infrastructure) wrote to the Chief Executive of the City of Charles Sturt confirming that he had been appointed to coordinate the government's interests in the future of the racecourse. As a senior officer in DTEI, Ms Carr would be likely to have been aware of this responsibility
  - a suggestion that as a LMC Board member Ms Carr would have been aware of negotiations conducted during 2008 about the possible purchase by the LMC of land adjacent to the racecourse owned by Trident Plastics. This involvement went beyond the St Clair land, the related land swap and community concerns about open space. A letter dated 13 November 2008 from the Managing Director of Trident Plastics to the Chief Executive of the LMC confirms that discussions had been ongoing at that time between Trident and the LMC about the possible sale of the Trident site to either the LMC and/or the St Clair development consortium. A letter dated 4 December 2008 between the same parties expresses considerable irritation at the LMC's

alleged failure to deal with the matter satisfactorily, since discussions commenced at the LMC's behest on 10 January 2008 (confirmed by letter dated 25 January 2008 from the CEO of the LMC). The 4 December 2008 letter refers expressly to the contention that 'the LMC Board, SA government, JV and local council are not interested in relocating Trident'

- documents released to him under FOI by the LMC 'which are dated *post* Ms Carr's appointment to the LMC Board indicate how much the racecourse was still a part of the LMC's affairs'. This includes a Commitment Deed which was a pre-requisite for revoking the racecourse's open space proclamation; which was contentious and difficult to finalise; and which it is reasonable to assume would have been discussed at LMC Board level
- he agreed with my provisional conclusion that the URA had understated the LMC's involvement in the Cheltenham development
- he noted that he had sought documents from the URA under FOI, and that this had been the subject of a determination by my office. He had only recently received the documents which I determined not to be exempt from disclosure
- he foreshadowed further complaints to my office about particular actions of the City of Charles Sturt and the LMC in relation to the Cheltenham development
- he submitted that in view of the positions held by Ms Carr in her DTEI role; as a board member of the LMC and the State Procurement Board; and as Deputy Chair of the Australian Procurement and Construction Council, she is 'biased to favouring outcomes that align with the development-related targets of the State government's Strategic Plan and the 30-Year Plan for Greater Adelaide'. He submitted that her 'decision as to the Grandstand leant more heavily towards supporting these outcomes and less to the factors she is required to consider when wearing her Heritage Council hat'. For this reason he did not agree with my provisional conclusions in regard to bias
- he noted that an association member had contacted my office about the heritage assessment report prepared in relation to the nomination of the grandstand, and had been advised to submit the association's response to the heritage unit in the first instance
- he noted that the material involved in renominating the grandstand 'was not inordinately hard to find in the public domain, and this highlights the problem inherent in the [heritage unit's] lack of resources to undertake the required research themselves'.

As a consequence of the complainant's submissions, I considered it appropriate to interview Ms Carr on affirmation. I did this on 21 August 2012, during which I provided her with an opportunity to make further submissions to me.

I received no further response to my revised provisional report from the SAHC.

I have considered the responses which I received, and taken account of them as I consider appropriate in finalising my views. I have also re-considered the SAHC's response to my provisional report as outlined above.

## Background

1. On 12 September 2011, the complainant wrote to my office requesting an investigation into the circumstances surrounding the demolition of the grandstand. The complainant's concerns can be summarised as follows:
  - a. the grandstand should be protected on the basis of its heritage value
  - b. the grandstand should have been provisionally entered in the register while assessment of its heritage significance was carried out
  - c. whether the decision maker had delegation to make the decision to not provisionally list the grandstand
  - d. whether it was appropriate that the decision maker consider the matter having regard to her role as a board member of the LMC.
2. In 1994 the whole of the Cheltenham Racecourse land was nominated in a heritage survey conducted by the former City of Woodville Heritage Survey as being a place of local significance. However, after the City of Woodville was amalgamated into the City of Charles Sturt (**the local council**), the grandstand was not included as a local heritage place in its development plan, as part of the Hindmarsh and Woodville Heritage Plan Amendment Report (**the PAR**) in 1997. Further, a subsequent review of heritage places undertaken by the local council in 2004 did not recommend the grandstand for inclusion as a local heritage place.
3. In August 2004, the South Australian Jockey Club announced its intention to sell the Cheltenham Racecourse land. Discussions commenced between the local council and the state government regarding an integrated redevelopment of this land (**the Cheltenham development**), the St Clair Reserve and the former Sheridan industrial land (together known as **the St Clair development**) for residential purposes.<sup>3</sup>
4. The LMC advised the Minister for Infrastructure on a range of matters surrounding the Cheltenham Racecourse land, including master planning the redevelopment, and undertaking a community consultation process in 2006.<sup>4</sup>
5. On 18 February 2008, Ms Judith Carr was appointed to the LMC board of directors for a two year term.
6. In 2008 the grandstand was nominated for state heritage listing and subsequently rejected (on 30 March 2009).
7. The Cheltenham Park Racecourse Ministerial Development Plan Amendment came into operation on 14 August 2008. The statement of investigations included consideration of the suitability of the site for redevelopment, including, among other things, heritage considerations.<sup>5</sup>
8. On 18 December 2008, Ms Carr was appointed as the chair of the SAHC.
9. On 1 February 2010, Ms Carr was appointed to the LMC board of directors for a further two year term.
10. On 11 March 2011 the local council authorised demolition of the grandstand under the *Development Act 1993*.

<sup>3</sup> See: Investigation into the City of Charles Sturt Final Report November 2011 Ombudsman SA at Part 2.2.

<sup>4</sup> Information provided to my investigation by the chief executive officer of the LM Con 20 December 2012; Article from the Advertiser 'Concepts for Cheltenham on Show' [http://www.sensational-adelaide.com/forum/viewtopic.phpHeritage Places?f=8&t=534](http://www.sensational-adelaide.com/forum/viewtopic.phpHeritage%20Places?f=8&t=534) 15/09/2011.

<sup>5</sup> Item 6.140 City of Charles Sturt Report to Council 25/07/11.

11. On 22 June 2011, the Cheltenham Park Residents Association (**the CPRA**) made an application to the SAHC requesting that the grandstand be listed in the register.
12. In August 2011, the SAHC established a Policy and Governance Committee to make recommendations to the SAHC regarding its policies, procedures and guidelines, and governance issues.
13. Demolition of the grandstand commenced on 3 September 2011.
14. On 5 September 2011 the National Trust of South Australia (**the NTSA**) emailed DENR requesting that a stop order be issued under section 30 of the Heritage Places Act. In response DENR staff commenced gathering material to conduct an assessment of the heritage value of the grandstand, and sought verbal advice from the Crown Solicitor's Office regarding the format and process of issuing a stop order.
15. Later on the same day, after receiving advice from the Senior Heritage Officer, Ms Carr exercised her delegation under section 30(1) of the Heritage Places Act to not make a stop order in relation to the grandstand. She announced in the media that under delegation she had decided not to provisionally enter the grandstand in the register, and not to issue a stop order under section 30 of the Heritage Places Act.
16. On 6 September 2011 the Senior Heritage Officer (Policy) in DENR advised the president of the NTSA that Ms Carr had made a decision under delegation to not provisionally enter the grandstand in the register, and a decision to not issue a stop order under section 30 of the Heritage Places Act.
17. On 12 September 2011 a report was put to the local council recommending that it either investigate including key historically significant elements of the grandstand for reuse or adaption into the urban design of the open space associated with the Cheltenham redevelopment; or investigate the inclusion of the grandstand as a local heritage place as part of the development plan amendment process.
18. On 16 September 2011, the complainant provided additional information to my office in relation to the role of the LMC in the Cheltenham development. The relevant documents from the period March 2007 to September 2011 refer to collaboration between developers, state and local government on the redevelopment of the grandstand land in particular with respect to open space, wetlands and stormwater capture and reuse.
19. On 26 September 2011, the complainant again provided additional information in relation to the role of the LMC in the Cheltenham development. The relevant documents from the period December 2004 to November 2011 refer to:
  - the Minister for Infrastructure delegating responsibility to the LMC to coordinate state and local interests in the Cheltenham development<sup>6</sup>
  - the LMC undertaking the community consultation<sup>7</sup>
  - a newspaper report in relation to the development indicating that the LMC would oversee the tender process for choosing a developer<sup>8</sup>
  - an advertisement in The Advertiser authorised by the LMC stating that 'LMC will also provide the state government with recommended development outcomes for the site'<sup>9</sup>

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<sup>6</sup> Item 6.46 City of Charles Sturt report to Council 29/03/05.

<sup>7</sup> Notes of meeting between CPRA representatives and the LMC dated 13 May 2005 (as provided to my investigation by the complainant).

<sup>8</sup> The Advertiser, Monday 3 July 2006.

<sup>9</sup> The Advertiser, Saturday 29 July 2006.

- a letter from the Minister for Infrastructure which identifies the role of the LMC in the development with respect to stormwater, community consultation, and development options<sup>10</sup>
  - a letter to the editor from the LMC explaining its role in the development and emphasising that 'we (LMC) do not act for the owners, nor would we receive any financial benefit irrespective of whether or not the site is sold'<sup>11</sup>
  - a community consultation report prepared by an agent of the LMC<sup>12</sup>
  - correspondence to the complainant from the LMC indicating that the LMC has 1031 documents in relation to the development.<sup>13</sup>
20. On 2 November 2011, Ms Carr provided me with information which I had requested on 12 September 2011. In addition, she advised me that the SAHC has been actively considering broad policy issues including community awareness and local government powers regarding heritage protection; and that in relation to administrative support levels:

DENR has undergone a restructure in the past year which has resulted in a number of delegates of the Council and employees previously providing support for the council's functions under the Act being transferred to other directorates within DENR with a resultant reduction in capability.

21. On 2 November 2011, the complainant provided me with further documents that in his view evidenced the involvement of the LMC in the Cheltenham development. Many of these documents related to events before 18 February 2008.
22. On 5 December 2011, Ms Carr wrote to me enclosing legal advice obtained by the SAHC in relation to the issue of the stop order.
23. On 21 December 2011, the SAHC advised the complainant that the media coverage on 5 December 2011 did not accurately reflect the decisions that had been made; and that while a decision had been made to not issue a stop order in relation to the grandstand under section 30 of the Heritage Places Act, the delegate had not considered whether to provisionally list the grandstand under section 17(2) of the Heritage Places Act.
24. On 16 January 2012, the Acting Manager of the Heritage Policy Unit in DENR made a decision under delegation to not provisionally enter the grandstand in the register as a state heritage place. This decision was based on a 10 page report prepared by officers of DENR dated January 2012. On 16 January 2012, the complainant was advised of this decision, and on 31 January 2012, he was provided with a copy of the heritage assessment on which the decision was based.
25. On 1 March 2012, I requested further information from the URA<sup>14</sup> in relation to its interests in the grandstand land. The Chief Executive replied on 6 March 2012:

As noted in my letter to you dated 20 December 2011 the Urban Renewal Authority and its predecessor agencies only ongoing involvement in regard to the development of the former Cheltenham Park Racecourse relates to ensuring the compliance of the developer with the obligations contained in the commitment deed... vis-à-vis the provision of affordable housing; the Aquifer Storage and Recovery System and public open space.

<sup>10</sup> Letter to Ms Judy Marsland dated 31 August 2006.

<sup>11</sup> The Advertiser, Monday September 25 2006.

<sup>12</sup> Natalie Fuller and Associates Pty Ltd, October 2006.

<sup>13</sup> Dated 15 September 2011.

<sup>14</sup> The Land Management Corporation was formally dissolved on 29 February 2012 through the *Public Corporations (Land Management Corporation) (Dissolution and Revocation) Regulations 2012* and all of its assets, rights and liabilities were vested in the Urban Renewal Authority which was established on 1 March 2012 by the *Housing and Urban Development (Administrative Arrangements) (Urban Renewal Authority) Regulations 2012*.

## Whether the chair of the SAHC should not have exercised delegated powers under the Heritage Places Act in relation to the Cheltenham grandstand

26. The first issue which arises is whether, in view of her position as a director of the LMC, Ms Carr should have made any decisions on heritage issues affecting the grandstand. The SAHC Procedure: Delegation of South Australian Heritage Council's Powers and Functions adopted on 15 June 2009<sup>15</sup> (the SAHC procedure) provides:

Delegations should not be exercised where a conflict of interest or a perceived conflict of interest exists. If there is such a conflict, then the delegate must disclose the conflict to the Council and any such conflicts of interest the delegate believes are likely to arise in the future.

27. To determine whether Ms Carr had a conflict or perceived conflict of interest in the consideration of the heritage issues relating to the grandstand, it is necessary to consider the role of the LMC in relation to the grandstand land. I have considered the documents provided to my investigation by the complainant, the SAHC, the LMC and the URA and other information in the public domain.

28. The chief executive of the URA has noted the public perception of the role of the LMC in relation to the grandstand land:

LMC is aware that there has been a level of misunderstanding in the community regarding its role in relation to the former Cheltenham Park Racecourse;

He went on to offer an explanation of the role of the LMC in relation to the grandstand land as follows:

- In 2004 the South Australian Jockey Club (SAJC) deemed the Cheltenham Park Racecourse surplus to its requirements and decided that it wished to dispose of the land. The SAJC did not require any approvals from Government to sell its land however two key matters affected the land's development potential. Firstly, the land was zoned 'Special Use' and secondly, the land was covered by an open space proclamation pursuant to section 29 of the *Town Planning Act 1929*. The SAJC made a submission to the South Australian Government seeking to amend the zoning requirements and seeking the revocation of the open space proclamation to enable the SAJC to maximise the development potential for their land.
- Given the scale of the landholding in question, in late 2005 LMC was asked by the State Government to commission an indicative master plan for the site to consider how redevelopment of the SAJC site might be complementary, or otherwise, to current government policy objectives and to identify the broad issues associated with any such redevelopment. This work was to be undertaken to assist in the State Government's deliberations in relation to the SAJC's submissions.
- In mid-2006 LMC was further asked by the South Australian Government to undertake a public consultation process on options arising from the indicative master planning process. Community feedback suggested that the provision of open space was the key element of concern and the consultation necessarily focussed on the area of useable open space that might be provided through the redevelopment.
- Following the consultation, a report was prepared by Natalie Fuller and Associates summarising the outcomes of the consultation and this report was released publicly. This same report was provided to government as an annexure to a Cabinet submission and contributed to State Cabinet's considerations regarding the site. The final decisions in relation to the issues of zoning and the revocation of the open space proclamation were made by State Cabinet.

<sup>15</sup> This procedure was scheduled for review in June 2011.

- Following a strong and consistent theme from the local community regarding the provision of useable open space in the redevelopment of the Cheltenham Park Racecourse site, State Cabinet determined that \$5 million from the Planning and Development Fund (the P&D funds) should be used to secure open space outcomes on the site.
- In late 2008 on behalf of government LMC commenced negotiations on a Commitment Deed between LMC, the Minister for Urban Development and Planning, SAJC, and the development consortium comprising Urban Pacific Pty Ltd and AV Jennings Pty Ltd to establish a formal mechanism for ensuring compliance with the conditions imposed on the use of the P&D funds, namely:
  - The provision of 15% affordable housing within the development;
  - The provision of 35% open space in lieu of the standard 12.5%; and
  - The construction of an Aquifer Storage and Recovery (ASR) system within the open space land.
- The Commitment Deed was finalised in March 2009 and appointed LMC as the Minister's representative with the role of ensuring compliance with the above conditions and for ensuring that the P&D funds are appropriately managed.

29. I have considered the Commitment Deed. As I read it, the obligations on the LMC under the Commitment Deed go further than described by the Chief Executive of the URA. I note in particular the effect of clauses 4.1, 4.2 (a) and (c), and clause 6 of the Deed. I note the recitals A - G under the heading of Background. On my reading of the deed:

- the open space development includes the land division and future residential development of the land<sup>16</sup>
- the completion of the open space development is an objective of the parties in entering into the deed<sup>17</sup>
- in carrying out the objectives of the deed, the parties must:
  - be just and faithful and provide full information to each other in relation to the affairs of activities in relation to the Open Space Development<sup>18</sup>
- the LMC is obligated to do all things necessary and anything reasonably required by the state government to expedite the open space revocation process<sup>19</sup>
- as nominee and agent of the Minister the LMC is essentially under the direction of the Minister.<sup>20</sup>

30. I note also the documents provided to my investigation by the complainant, which show that the LMC has had an active and ongoing role in relation to the Cheltenham development since 2004. I note further the 'useful links' link on the former LMC website to the official St Clair website.<sup>21</sup>

#### *Public officer obligations in relation to conflict of interest*

31. The term 'conflict of interest' can refer to situations in which a conflict arises between a public officer's duty to serve the public and the public officer's other interests.

<sup>16</sup> Background recital A and B and definition of Open Space Land.

<sup>17</sup> Clause 4.

<sup>18</sup> Clause 4.

<sup>19</sup> Clause 3.2(a).

<sup>20</sup> Clause 2.1(a) and (b).

<sup>21</sup> I note the preamble to the link which read: 'The St Clair development comprises of the former Cheltenham Park Racecourse and Sheridan/Actil site: <http://www.stclair.net.au>'.

<http://www.lmc.sa.gov.au/home/inner.asp?pageid=335> as at 15 September 2011.

32. Managing conflict of interest is crucial to maintaining public confidence in government. In a joint publication in 2004, the NSW Independent Commission Against Corruption and the Queensland Crime and Misconduct Commission commented:

The community expects that public officials will perform their duties in a fair and impartial way, putting the public interest first at all times.

...

Conflicts of interest are not wrong in themselves - public officials are also private individuals and there will be occasions when their private interests come into conflict with their duty to put the public interest first at all times - but such conflicts must be disclosed and effectively managed.

...

A transparent system that is observed by everyone in an organisation as a matter of course will also demonstrate to members of the public and others who deal with the organisation that its proper role is performed in a way that is fair and unaffected by improper considerations.

Failure to identify, declare and manage a conflict of interest is where serious corruption often begins and this is why managing conflicts of interest is such an important corruption prevention strategy.<sup>22</sup>

33. The common law recognises that a conflict of interest might comprise:

- an actual conflict
- a potential conflict
- a perceived conflict
- a conflict of duty.

In the situation which arises in this complaint, I consider that the issue of conflict of duty is particularly relevant.

34. The Code of Ethics for the South Australian Public Sector (**the code**) published under Part 4 of the Public Sector Act similarly recognises these 'types' of conflicts.<sup>23</sup> The code provides in relation to conflicts of interest:

- conflicts of interest can pose a major hazard to honest public administration. It is vital that the public has confidence that the public sector and its employees will act impartially and without prejudice. Public sector employees must not have a personal interest in, or be party to, decisions they make in the performance of their duties
- a conflict of interest can be actual or potential. It relates to circumstances where the employee is or could be influenced, or there is potential for them to be influenced. Employees will avoid actual or potential conflicts of interest
- (...)
- employees will disclose in writing to the agency heads any actual or potential conflicts of interest at the earliest available opportunity and comply with any lawful and reasonable direction issued by a person with authority to issue such direction to resolve the conflict or potential conflict, including written direction by a relevant authority pursuant to the *Public Sector (Honesty and Accountability) Act 1995*.

<sup>22</sup> NSW ICAC and Queensland Crime and Misconduct Commission, *Managing Conflicts of Interest in the Public Sector - Guidelines*, November 2004, p7.

<sup>23</sup> Code of Ethics South Australian Public Sector, pp 17 and 19.

35. A Department of Premier and Cabinet publication<sup>24</sup> summarises the requirements of the *Public Sector (Honesty and Accountability) Act 1995* insofar as it imposes duties on the members of 'corporate agencies'.<sup>25</sup> These duties include the obligation to disclose any 'personal or pecuniary interest in a matter decided or under consideration by the agency', and to withdraw from any meeting at which the matter is considered.<sup>26</sup> It is an offence to fail to comply with this obligation.
36. The SAHC has adopted the Meetings Guideline dated 18 March 2011 which requires that a member of the council's disclosure of any potential conflict of interest be made in writing to the Executive Officer. While this guideline appears to relate only to the disclosure of conflicts in relation to matters that are on the agenda for consideration at a council meeting, it reinforces the message in the SAHC Procedure and the Code that a decision maker should disclose a potential conflict of interest.<sup>27</sup>
37. My investigation was advised that SAHC is guided by the Crown Solicitor's Office Legal Bulletin No. 5 Conflicts of Interest of Members of Statutory Authorities.<sup>28</sup> I refer to Appendix B to the document titled Conflict Of Interest Guidelines for Members of Statutory Authorities (**the guidelines**), which states:

It is sensible to be cautious and conservative when considering whether a conflict of interest exists; if in doubt, it is sensible to assume that there is a conflict and act accordingly<sup>29</sup>.

#### *Ms Carr's position*

38. In responding to my provisional report, Ms Carr stated that she was not in a position to be alert to any potential or perceived conflict at the time she made the decision under delegation from the SAHC. She stated that she 'was not aware that the Cheltenham Grandstand had been part of land subject to LMC Board advice in the past'. She stated that she only became aware of that fact for the first time after the complainant raised the matter with me.
39. In her response, Ms Carr also noted that:

There were discussions at the LMC board level after I became a member, but to the best of my recall they were always about the 'St Clair' land and in particular the land swap arrangements and community concerns about 'open space'. I did not connect the Cheltenham Grandstand to these discussions, nor have you provided any evidence in your listing of documents under item 28<sup>30</sup> that I should have been in possession of the fact that the LMC Board had been involved in regard to a development that included the Cheltenham Grandstand.

<sup>24</sup> Department of Premier and Cabinet, *Honesty and accountability for members of government boards*, March 2011.

<sup>25</sup> 'Corporate agency member' is defined in section 2(1) of the Public Sector (Honesty and Accountability) Act as including a member of a public sector agency that is a body corporate. This includes the SAHC.

<sup>26</sup> Section 8(1) of the Public Sector (Honesty and Accountability) Act.

<sup>27</sup> The SAHC Procedure: Delegation of South Australian Heritage Council's Powers and Functions; The Public Sector Code of Ethics published under the Public Sector Act.

<sup>28</sup> My investigation was informed that the legal bulletin forms part of the induction manual for members of the council. I note that the legal bulletin has been withdrawn; however, its apparent adoption by the council as a policy gives it status as a document that guides the conduct of the members of the council.

<sup>29</sup> Legal Bulletin No.5 Conflicts of Interest of members of Statutory Authorities  
<http://intra.sa.gov.communicating.crownsolicitors/legalbulletins/bulletin5.pdf>

<sup>30</sup> The equivalent section in this report is also paragraph 28.

40. Ms Carr confirmed these comments when I interviewed her on affirmation. I accept that at the time she made the decision on heritage listing of the grandstand, she was not actually aware of the LMC's past role in the Cheltenham development. Notwithstanding the circumstantial evidence to which the complainant has pointed, the URA has advised me that only one item was considered at LMC board level after Ms Carr's appointment, and that this related to the proposed Cheltenham Aquifer Storage and Recovery System.
41. However, I consider that at least a perceived conflict of duties arose from Ms Carr's duties as a director of the LMC and her duty as chair of the SAHC. The fact that she was not alert to the issue, and was not advised of it by DENR officers, does not prevent the conflict arising. What is relevant is what steps Ms Carr took, if any, to manage this conflict.
42. In my view, as a board member of the government's land development agency, Ms Carr should have considered the possibility that that agency may have had some involvement in the development of which the grandstand demolition was a part. The issue of the associated St Clair development was one of public notoriety at the time, and this notoriety revolved around the government's interest in the development.
43. I consider that a prudent person undertaking the different roles which Ms Carr did should have adverted to the possibility that a conflict of duties might exist, and should have taken steps to enquire about the matter. I note that the LMC has ongoing responsibilities under the Commitment Deed, and I consider that it was Ms Carr's personal responsibility to ensure that any conflict was identified and managed. It was not reasonable for Ms Carr to rely on advice from others (e.g. a DENR officer), in relation to matters which concerned the offices which she held personally.
44. Further, in the circumstances as they were, in my view it was foreseeable that a fair minded and informed member of the public might perceive such a conflict. Accordingly, in my view it was wrong for Ms Carr to exercise delegated powers under the Heritage Places Act in relation to the grandstand.<sup>31</sup>
45. Management of perceived conflicts is important for the integrity of government. In any event, it is a requirement of the code. I do not consider that Ms Carr appropriately managed her perceived conflict in accordance with the code or the guidelines. I consider this to be the case notwithstanding that the role of the LMC with respect to master planning and public consultation predated Ms Carr's appointment to the board of the LMC.

#### *Apprehension of bias*

46. Perceived conflicts may be a contributor to allegations of bias or apprehension of bias. The test for determining whether a decision is infected with apprehended bias is an objective one, being:
- Whether a fair-minded, lay observer might reasonably apprehend that the decision maker might not bring an impartial and unprejudiced mind to the resolution of the question which the Judge is required to decide.<sup>32</sup>
47. Rather than look to the state of mind of the decision maker, it is necessary to look at the 'decision itself and the manner in which it was apparently arrived at':

<sup>31</sup> Noting in particular the terms of the SAHC procedure: Delegation of South Australian Heritage Council's Powers and Functions.

<sup>32</sup> *Johnson v Johnson* [2000] HCA 48 at 11.

Quite different considerations are raised when an allegation of *imputed* bias is made in this Court. An applicant in such a case is not concerned, as such, with the state of mind or attitude of the decision-maker. The focus of attention is on the decision itself and the manner in which it was apparently arrived at. The criteria are not subjective to the decision-maker. They are wholly objective. The issue raised is decided not by reference to a serious accusation of deliberate wrong-doing and misuse of office. It is judged by the much more readily established consideration of how the decision, and the process of arriving at it, *might* appear to the persons affected and to the public, judged reasonably and objectively.<sup>33</sup>

48. To establish apprehended bias it must be shown:
- that the decision maker has an interest in the matter before it; and
  - that the circumstances of the decision give rise to a possibility that decision making has not been impartial.<sup>34</sup>

49. While the test for apprehended bias is less stringent than for actual bias, it is still necessary that allegations of bias be 'firmly established':

Such bias must still be "firmly established". It is not enough that the reasonable bystander has a vague sense of unease or disquiet. The test for imputed bias, which has now been accepted by this Court, is expressed in terms of possibilities ("might"), rather than of the proof of a "high probability" of bias inconsistent with the fair performance of public duties, that was formerly the accepted criterion.<sup>35</sup>

The reason for embracing this different, and less stringent, requirement in the case of allegations of imputed bias is not difficult to find. It can be attributed to the social purpose served by this branch of the law of natural justice. That purpose is to uphold vigilantly the high standards applicable to the appearance of justice and fairness in official decision-making in Australia. At least two reasons sustain this approach. If the appearances are just, and the procedures manifestly fair, the likelihood is that just and fair conclusions will follow. As well, appearances affect the confidence of the community in the decisions of those who exercise public power on the community's behalf.<sup>36</sup>

50. I am of the view that the SAHC and its delegates are bound by the rules of natural justice. This is not only because I consider that a decision under the Heritage Places Act in relation to a place potentially affects the rights, interests and legitimate expectation of an individual.<sup>37</sup> There is an expectation that all public officers will consider matters for which they have delegated authority fairly and impartially:

Indeed, the law seems to me to be moving towards a conceptually more satisfying position where common law requirements of procedural fairness will, in the absence of a clear contrary legislative intent, be recognized as applying generally to governmental executive decision-making (cf. Halsbury's Laws of England, 4th ed (1989), vol 1(1), par 85) and where the question whether the particular decision affects the rights, interests, status or legitimate expectations of a person in his or her individual capacity is relevant to the ascertainment of the practical content, if any, of those requirements in the circumstances of a particular case and of the standing of a particular individual to attack the validity of the particular decision in those circumstances.<sup>38</sup>

Although many of the cases concerning imputed bias have related to courts, tribunals and decision-makers connected with them, the rule is one that applies to the decisions of every public office-holder. Being a rule of natural justice, it adapts to the nature and significance of the decision concerned, the character of the office of the decision-maker and the requirements, express or implied, of any legislation applicable to the case.<sup>39</sup>

<sup>33</sup> Kirby J in *Minister for Immigration v Jia Legeng* [2001] HCA 17 at 134.

<sup>34</sup> *Ebner v Official Trustee in Bankruptcy* (2000) CLR 337 at para 7 and 8.

<sup>35</sup> Kirby J in *Minister for Immigration v Jia Legeng* [2001] HCA 17 at 135.

<sup>36</sup> Kirby J in *Minister for Immigration v Jia Legeng* [2001] HCA 17 at 136.

<sup>37</sup> *Kioa v West* (1985) 159 CLR 550.

<sup>38</sup> Deane J in *Haoucher v Minister for Immigration & Ethnic Affairs* [1990] HCA 22.

<sup>39</sup> Kirby J in *Minister for Immigration v Jia Legeng* [2001] HCA 17 at 136.

51. Accordingly, in the discharge of its powers under section 30 of the Heritage Places Act on 5 September 2011, Ms Carr was required not only to be, but to appear to be, unbiased:

Where the obligation exists, its precise content varies to reflect the common law's perception of what is necessary for procedural fairness in the circumstances of the particular case. In some cases where the requirements of procedural fairness are applicable, nothing less than a full and unbiased hearing of each affected individual's case will satisfy them. In other circumstances, something less may suffice. Thus, the circumstances of a particular case may be such that procedural fairness does not require that each person affected be accorded an effective opportunity of being personally heard before a decision is made but nonetheless requires that the decision-maker be, and appear to be, personally unbiased (see, e.g., Jackson, *Natural Justice*, 2nd ed (1979), p 100).<sup>40</sup>

52. I consider that a reasonable and dispassionate observer might well conclude that the delegate, by virtue of her role on the board of the LMC had an 'interest' in the question of whether the demolition of the grandstand should be stopped.
53. A reasonable and dispassionate observer might also have concerns about how quickly the decision was made. On the other hand, the demolition had commenced, and in a sense it was reasonable for the decision maker to act quickly. Further, it is clear from the papers that I have seen that the decision was made on the advice of the officers providing heritage advice to the SAHC.
54. On the facts, I do not consider that apprehended bias on behalf of Ms Carr can be established.

*A perceived conflict of interest*

55. I acknowledge that Ms Carr was unaware of the role of the LMC in the Cheltenham development, but she took no steps to ascertain whether any conflict may have arisen. On the basis of my finding that she had at least a perceived conflict of duties in relation to the grandstand, it is my view that:
1. her interest should have been disclosed (having regard to the SAHC Procedure, the code and the common law)
  2. she should not have exercised delegated powers in relation to the grandstand (having regard to the SAHC procedure, the code and the common law).
56. The SAHC delegations allow the manager of the Heritage Policy Unit, Natural and Cultural Resources, Policy in DENR to exercise a delegation under section 30(1) of the Heritage Places Act. I consider that in the circumstances of Ms Carr's perceived conflict of duties, the appropriate course would have been for the decision to be made by another delegate who did not have a personal obligation to the LMC.

**Opinion**

In light of the above, my opinion is that the chair of the SAHC should not have exercised delegated powers under the Heritage Places Act in relation to the Cheltenham grandstand, and accordingly the SAHC acted in a manner that was contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

<sup>40</sup> Deane J in *Haoucher v Minister for Immigration & Ethnic Affairs* [1990]HCA 22.

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## Whether the SAHC wrongly failed to issue a stop order regarding, and to provisionally list, the Cheltenham grandstand under the Heritage Places Act

57. The second issue is whether, notwithstanding the fact that in my view Ms Carr should not have exercised delegated powers, the substantive decisions made by the SAHC about the heritage issues surrounding the grandstand were in error.
58. The initial complaint was based on the decision made by Ms Carr on 5 September 2011. At the time of the complaint, it was understood that the decision maker had made two decisions in relation to the grandstand (one in relation to whether to issue a stop order under section 30 of the Heritage Places Act, and the other in relation to whether or not to provisionally list the grandstand on the register under section 17 of the Act). It transpired that at that point, Ms Carr had in fact only made a decision in relation to the issue of the stop order.
59. From my review of the paper work it appears that Ms Carr received advice from her senior policy officer, and that advice included a draft media release. An express recommendation was made that SAHC not issue a stop order. The advice did not expressly address the question of provisionally listing the grandstand, but the media release was drafted as though it had. It was arguably implicit in the advice of the heritage staff that a decision to provisionally list the grandstand would not be justifiable:
- The Heritage Assessment staff of the heritage policy unit, DENR have reviewed the evidence provided by the local community and other material used to consider the status of the racecourse previously and determined that the Cheltenham Park Racecourse Grandstand does not fulfil any of the criteria under the Heritage Places Act.
60. Ms Carr then responded by email to her adviser (and copied to the Minister) only in relation to the stop order under section 30 of the Heritage Places Act:
- Thank you for the advice, Hamish.  
I have decided that the Council will not issue a stop order.
61. It is not clear to me that Ms Carr properly understood the matters before her for consideration on 5 September 2011, and/or the effect of what she had decided. It may be that she read the draft media release as part of the recommendation and intended to adopt it in its entirety; or that she deliberately made a decision only in relation to the exercise of her powers under section 30(1) regarding a stop order. In any event, the SAHC took the view that no decision had been made with respect to listing under section 17,<sup>41</sup> and another delegate has since determined the matter.
62. In my provisional report I expressed concerns with the manner in which the SAHC appears to have been interpreting the respective use of section 30 and section 17(2).<sup>42</sup> I note however that since the commencement of my investigation, the SAHC has obtained legal advice on this point and through its recently established Policy and Governance Committee, is in the process of preparing and adopting a guideline to assist delegates with the exercise of discretions when exercising these powers.

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<sup>41</sup> Letter to complainant from the Manager of the Heritage Policy Unit in DENR dated 25 November 2011.

<sup>42</sup> Based on information contained in the response of the Minister to the complainant.

63. With respect to the decision in relation to the issue of the stop order, I note that the SAHC has sought and obtained legal advice.<sup>43</sup> The advice, which has been provided to me, indicates that the decision of the SAHC was lawful;<sup>44</sup> and I accept the conclusions of the Crown Solicitor in this regard.
64. With respect to the reasonableness of the decision, I have considered the reasons for the delegate's decision as set out in a Form 1 'Report on Exercise of Delegations'. I am satisfied that the delegate's decision was reasonable, and based on the advice of the heritage assessment staff of the heritage policy unit in DENR.
65. However, I note that the Form 1 is dated 31 October 2011, more than a month after the decision was made, and indeed after the commencement of my investigation. While this might be sufficient compliance with the condition on the exercise of the delegate's powers,<sup>45</sup> I note my concern about the delay in terms of record keeping and good administrative practice.
66. The question of whether the grandstand should have been provisionally listed in the register was considered by the Acting Manager of the Heritage Policy Unit on 16 January 2012. The Acting Manager made a decision under delegation to not provisionally enter the grandstand on the register. In this sense, any irregularity with respect to the delegate's decision of 5 September 2011 has been cured.
67. The complainant has not complained to this office in relation to this particular decision,<sup>46</sup> but there is a long history and context to the decisions made on 5 September 2011 and 16 January 2012. The background above refers to the professional opinions obtained and administrative decisions made prior to 2011. In particular:
- in 2009 the heritage value of some features of the racecourse site was considered, and they were rejected for inclusion in the state register<sup>47</sup>
  - expert advice suggests that at its highest, the value of the grandstand is as a local heritage place
  - the local council has not seen fit to make policies that protect the heritage value of the grandstand<sup>48</sup>

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<sup>43</sup> The advice was sought after the delegate's decision had been made.

<sup>44</sup> That advice does not consider the issue of whether it was appropriate for the chair to exercise delegated power in the circumstances.

<sup>45</sup> It is a condition of the exercise of delegation under section 30(1) of the Heritage Places Act that the delegate report on the exercise of delegation to the next SAHC meeting using a Form 1.

<sup>46</sup> In responding to my revised provisional report, the complainant noted that a member of his association had raised the issue with my office, and was (correctly) advised that information about the nomination should be provided to the Heritage Policy Unit. This is consistent with my office's role as one of last resort.

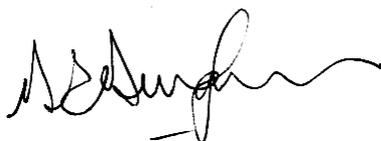
<sup>47</sup> The demolition (among other things) of a state heritage place requires authorisation under the Development Act. An application for authorisation would generally need to be referred to the Minister administering the Heritage Places Act for comment. The planning authority would need to have regard to any recommendation or condition proposed by the Minister. In the event that the planning authority was minded to not totally adopt the Minister's recommendations, the concurrence of the Development Assessment Commission would need to be obtained.

<sup>48</sup> Under section 23(4) of the Development Act, a development plan may designate a place as a place of local heritage value if certain criteria are satisfied. The demolition (among other things) of a local heritage place that could materially affect the heritage value of the place requires development approval under the Development Act. Assessment of an application for the demolition of a local heritage place involves consideration of development plan provisions relevant to local heritage items.

- development approval has been granted for the demolition of the grandstand<sup>49</sup>
- the delegates' decisions were made on the basis of expert advice prepared by officers of DENR.

### Opinion

In my opinion, in making its substantive decisions under the Heritage Places Act in relation to the Cheltenham grandstand, the SAHC did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.



Richard Bingham  
**SA OMBUDSMAN**

24 August 2012

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<sup>49</sup> Had the grandstand been listed as a place of local heritage value in council's development plan prior to the developer making an application for demolition, heritage considerations (as set out in the development plan) would have been relevant to the question of whether authorisation was granted to the application. If the grandstand had been listed as a state heritage item (in council's development plan, or by entry on in the state heritage register) prior to the determination of the development application, heritage considerations (as set out in the development plan) would have been relevant to the question of whether authorisation was granted to the application pursuant to section 53(4) of the Development Act. It is worth noting that if the SAHC had issued a stop order in relation to the grandstand, prior to a decision being made on the development application for demolition, that would have been a relevant consideration to the question of whether or not demolition should be granted (section 53(5) of the Development Act).